OMBUDSMAN OF BRITISH COLUMBIA

Special Report No. 15

to

The Legislative Assembly of British Columbia

THE WORKERS' COMPENSATION BOARD (No. 3)

VOLUME 1

Legislative Assembly
Province of British Columbia

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The Honourable K. Walter Davidson
Speaker of the Legislative Assembly
Province of British Columbia
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Mr. Speaker:

I have the honour to submit herewith a special report to the Legislative Assembly, pursuant to section 30(2) of the Ombudsman Act, R.S.B.C. 1979, chapter 306.

The report deals with five complaints arising out of decisions, practices or procedures of the Workers' Compensation Board of British Columbia. It summarizes my findings and recommendations and the responses of the Board in each case.

Yours sincerely,

Karl A. Friedmann

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Ombudsman

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TO

THE LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

THE INVESTIGATION BY THE OMBUDSMAN INTO FIVE COMPLAINTS ABOUT THE WORKERS' COMPENSATION BOARD

Table of Contents

INTRODUCTION	Page i
Case No. 1 - Mr. Peter Cheveldave	Page 1
Case No. 2 - Mr. Perry Swistak	Page 4
Case No. 3 - Mr. Craig McCargar	Page 6
Case No. 4 - Mr. Terrence Forrest	Page 12
Case No. 5 - Mr. Wilhelmus Chatrer	Page 19
APPENDIX A - Summary of Recommendations	Page 24
APPENDIX B - Correspondence	Page 26

INTRODUCTION

In this, my third Special Report to the Legislative Assembly on the Workers' Compensation Board, I report on five cases in which the Workers' Compensation Board and I have not been able to agree. Two of the cases (Mr. Cheveldave and Mr. Swistak) demonstrate the difficulties that workers can encounter in trying to prove hernia claims. Because hernias develop slowly over a period of time and because their actual occurrance is not capable of observation at the time clear evidence that they occurred at work is often difficult to produce. In the two cases reported, it is my view that the evidence produced by the workers is as clear as is possible for a hernia. The Workers' Compensation Board nevertheless seems to want more.

In Mr. McCargar's case the Board has denied his claim for back injuries in spite of the evidence in his favour. The Board speculates without any evidence that the injury must have had some other cause.

In the fourth case, Mr. Forrest suffered a compensable lower back and right hip injury. However, he went back to work before his condition had resolved and aggravated it. Again, the Board has denied his claim in spite of the evidence in his favour.

Finally, in Mr. Chatrer's case the issue is whether his spinal fusion was the result of previous compensable injuries. The Board relies on the opinion of its orthopedic consultant to deny the claim. Against this are the opinions of two other orthopedic consultants who support the claim and who have very specific criticisms of the opinion of the Board's orthopedic consultant. In my view, the evidence is balanced in favour of Mr. Chatrer's claim.

I have met with Mr. Walter Flesher, the Chairman of the Workers' Compensation Board, to discuss these cases. However, the Board's position remains unchanged. Each of these cases was also the subject of an individual report to the Lieutenant Governor in Council.

Each complainant has consented to the use of his name in this Special Report to the Legislative Assembly.

Mr. Peter Cheveldave

Re: Injury of a Hernia

Mr. Cheveldave worked in and around Trail, B.C. and was known as a skilled cabinetmaker and carpenter. He was known to have a somewhat distinctive lifestyle and worked his own hours but his work was always above reproach. He was also known to be a "naturally" careful worker.

In May 1979 Mr. Cheveldave had a hernia that was not related to any work activities.

On October 20, 1980 Mr. Cheveldave was putting a new shed over a small boiler at a cement products plant. While he was doing this work the foreman asked him to help move a roll of plastic. The roll was 4 feet long, weighed between 60 and 80 lbs. and was carried by the use of a pipe through the center. According to the foreman, it was "pretty well impossible" for one man to carry the roll. The two men moved the roll of plastic and in doing so had to manoeuvre over some obstacles so that the load was lifted to chest high on one occasion. As well, the move was done hurriedly and awkwardly. According to Mr. Cheveldave, "As I was at the rear of the load and the man in front was making fast and sudden movements or manoeuvres I had to absorb several sudden jars." He noticed a sudden pain and immediately put his end of the load down although the foreman had no recollection of the load being set down when interviewed later. Later in the afternoon Mr. Cheveldave's doctor diagnosed a right hernia as a result of "lifting heavy roll of plastic".

The Board denied Mr. Cheveldave's claim for compensation. Mr. Cheveldave complained to my office in December 1982 and I substantiated his complaint against the Board in February 1984. Initially there had been, in my view, an incorrect application of

Board policy with respect to whether the 1980 hernia was a recurrence of the 1979 hernia. The Board eventually agreed that the policy in circumstances such as Mr. Cheveldave's was unclear and the Commissioners undertook to ensure that claims adjudicators are aware of the correct policy.

As a result of my Preliminary Report, the Board carried out an investigation into the facts of the accident and concluded that there was a lack of evidence to support Mr. Cheveldave's claim that the injury had occurred at work. In arriving at this conclusion the Commissioners accepted the interpretation of their field investigator that there had been no obstacles in the way of the move as reported by Mr. Cheveldave. I found this interpretation was not correct. Transcripts of interviews with the foreman who helped Mr. Cheveldave move the roll of plastic, in fact, revealed that there was evidence the load had to be managed around obstacles although not the obstacles that Mr. Cheveldave recollected. The field investigation also concluded that the witness interviewed had nothing to gain by being other than sincere but the transcripts indicate that the witness did not want to go against the company or the Board because he had an injured foot and he did not want to endanger his position in any way.

The Commissioners then stated that the weight involved was not sufficient to bring about the occurrence of a hernia. My reply to this was to point out that the Board's own research into the incidents of hernias suggests that the occurrence of a hernia requires two factors operating at the same time. One is increased pressure on the abdominal wall and this can be caused by a normal force. The other factor is a congenital weakness in the abdominal wall. So a hernia is brought about by the effect of normal lifting on a pre-existing weakness. As well, I pointed out that focusing on

the weight of the load ignores factors specific to a particular case such as individual strength, speed of the lift, movements required, and obstacles that have to be manoeuvred around.

Finally, the Commissioners simply stated that they could see no reason to prefer my weighing of the evidence over theirs. However, I pointed out that there was a work activity that could have given rise to the injury complained of, the injury was reported to the employer as soon as practicable as required by the Act, and the doctor confirmed the injury on the same day that Mr. Cheveldave had a hernia. The only alternative explanation is that Mr. Cheveldave's hernia occurred before he came to work on October 20, 1980. The only evidence supporting this conclusion is the fact that Mr. Cheveldave did not explicitly state he was in pain at the time of the injury. In my experience, a worker who is faking an injury will make an exaggerated show of being injured. This did not occur here. The weight of evidence, in my view, is in favour of Mr. Cheveldave.

Recommendation

That the Board accept Mr. Cheveldave's claim.

Anticipated Impact

Payment of a period of wage loss plus related medical expenses.

Mr. Perry Swistak

Mr. Swistak is a young man who used to be a labourer on the green chain - generally acknowledged as a strenuous occupation. In 1979 he developed an inguinal hernia on his left side while he was at work, and received compensation. On January 23, 1980, he saw his family doctor for a routine physical. Among other things, he was checked for a hernia on his right side as he had been experiencing some discomfort; none was found, but some weakness of the right groin area was noted. Two days later, on January 25, Mr. Swistak returned to his physician's office because a small but definite lump had developed.

Between seeing doctors on January 23 and January 25, Mr. Swistak worked the January 24 late shift. He noticed the lump when he arrived home after midnight. He saw his physician's associate a few hours later and was sent to a specialist as a right inguinal hernia was suspected. On February 18, he underwent surgery.

In spite of this straightforward sequence of events, the Board contradicted the January 23 medical opinion of Mr. Swistak's regular physician and denied his claim on the grounds that his hernia actually occurred on January 10, and not between January 23 and January 25. The Board's reason was that the associate who diagnosed the hernia on January 25 had entered January 10 as the date of onset on the injury on the compensation application form that he filled out for Mr. Swistak.

Mr. Swistak believes that the associate confused the date of the beginning of discomfort (which was January 10) with the date that the hernia appeared, and made a simple recording error; several such errors are obvious on both forms that this physician filled out, and I agree that this is the only rational explanation. Otherwise, the

first medical examination would have found a hernia on January 23. The associate himself wrote a letter supporting Mr. Swistak's claim explaining that Mr. Swistak's regular physician could find only a weakness of the right groin on January 23. Long before any controversy over dates arose, the specialist also put in writing that January 10 was the date when discomfort started, and January 25 was the date that a hernia appeared.

But the Board preferred to disregard this evidence, and continued to reject Mr. Swistak's claim on the grounds that his hernia had occurred on January 10, two weeks before he saw either doctor. In my opinion, the Board has made a mistake of fact.

Recommendation

That the Board compensate Mr. Swistak for the time loss he incurred as a result of his right inguinal hernia.

Anticipated Impact

Payment of several week's wage loss benefits.

Mr. Craig McCargar

At age 18, Mr. McCargar was involved in a work accident in April, 1979. Although his employer reported to the Board that Mr. McCargar had suffered injuries to his left hand, elbow, shoulder, and back, the Emergency Department of the hospital Mr. McCargar attended diagnosed only his bruised left hand. It did not mention any other injuries. The Board accepted his claim for a left hand injury and paid him wage loss benefits.

Almost a year later, in March, 1980, Mr. McCargar suffered a second work accident when he slipped on oil and fell down in a sitting position. The employer reported that Mr. McCargar's back had been bothering him since his 1979 accident. Mr. McCargar's doctor reported in February 1980 that Mr. McCargar had complained of recurring low back ache for the past 10 to 11 months. This would mean that Mr. McCargar had complained of low back symptoms since approximately his first work accident. His recurring pain worsened and he was admitted to hospital in August 1980. In September 1980 he underwent surgery to a disc in his low back.

The Board adjudicator disallowed Mr. McCargar's 1980 claim. Mr. McCargar appealed this decision to the boards of review. They obtained an opinion from the surgeon who performed Mr. McCargar's back surgery. The surgeon stated that, although Mr. McCargar's condition could have existed for years or months prior to becoming symptomatic, there must always be an initial insult to produce the type of disruption of the anulus of the disc which Mr. McCargar suffered. The boards of review concluded that, since Mr. McCargar was young and he denied any previous injuries to his back, it was unreasonable to look beyond the injuries reported by Mr. McCargar to explain his symptoms and subsequent disc surgery. The boards of review upheld his appeal in a majority decision. However,

Mr. McCargar's success was short-lived. The Commissioners of the Board overturned the decision of the boards of review on the grounds that it was against the overwhelming weight of the evidence.

I found that the Commissioners' decision to disallow Mr. McCargar's 1980 claim was unjust. They had objected to the boards of review decision on the ground that the surgeon's report did not provide a reasonable basis for the decision of the boards of review. The Commissioners contended that as the 1979 injury was only a left hand injury and did not affect the back, the "initial insult" referred to by the surgeon could not have been caused by work.

The Commissioners claimed that Mr. McCargar's 1979 injury did not affect his back because of the lack of reference to a back injury in the reports received at the time, and to the lack of evidence of back complaints experienced between that time and February 1980, and again between February 1980 and March 28, 1980.

Following my report the Commissioners raised two further objections. First, they stated that if Mr. McCargar had suffered a <u>significant</u> back injury in the 1979 incident, it would have been mentioned at the time when treatment was first sought or soon afterwards. I pointed out that among the reports received at the time of the 1979 accident was one from Mr. McCargar's employer, which stated that Mr. McCargar injured his back. As for a lack of evidence of back complaints between the two injuries, Mr. McCargar subsequently obtained witness statements from his parents and fellow employees to the effect that he did have back problems in this time period and describing how these problems affected his work performance and activities.

I did not agree that Mr. McCargar needed to have suffered a significant back injury in April 1979 in order to damage and weaken the anulus of the disc as reported by his surgeon. In fact, his surgeon had allowed for the possibility that Mr. McCargar's back injury may not have been a significant one in stating that his condition could have existed for years or months prior to becoming symptomatic, depending on the degree of weakness or injury from the initial insult and from the various changes that occurred resulting from subsequent stress and injuries.

Second, the Commissioners contended that Mr. McCargar's testimony was contradictory as to whether he suffered back complaints after the 1979 incident. Specifically, the Commissioners point to a statement from Mr. McCargar that he had no further back pain after the 1979 injury. Mr. McCargar does not recall making this statement, and states that his telephone call to the Board on the date the statement was recorded was made from the hospital just prior to his surgery and when he was on medication. This statement stands out in isolation against all the other evidence on file. This evidence consists of Mr. McCargar's other statements to the Board; statements by his parents and fellow employees regarding their recollection of his back problems after his 1979 injury; and his doctor's report of February 1980 that Mr. McCargar stated he had had a recurring back ache for the past ten to eleven months. Therefore, the preponderence of the evidence points to the conclusion that Mr. McCargar did experience back problems between his two work injuries.

The Commissioners did not dispute Mr. McCargar's evidence that he had no back problems prior to his 1979 incident, and they did not dispute his evidence before the boards of review that he had no back

injuries prior to his work injuries. Considering those facts along with his surgeon's opinion that Mr. McCargar's condition was consistent with a back injury at any time prior to the surgery, the only back injury the surgeon could be referring to would be either the 1979 or the 1980 back injury, both of which occurred at work. Instead, the Commissioners have interpreted the specialist's report to mean that, without realizing it, Mr. McCargar could have suffered a work or non-work injury prior or subsequent to his 1979 work accident which did not immediately produce symptoms but was the cause of his subsequent condition.

The Commissioners state it is speculative to fix upon the April 1979 incident as the significant one. Although the back injury would not have needed to be a significant one, I believe it is more speculative to fix upon possible accidents that would have been so minor in nature that Mr. McCargar would be unaware of them as the cause of his later back pain and surgery. By emphasizing these unknowns the Board is not giving Mr. McCargar the benefit of the doubt when the possibilities are equally balanced, contrary to S.99 of the Workers Compensation Act.

Third, the Commissioners contrasted the opinion of Mr. McCargar's specialist with the specific opinions of three Board doctors that there was no relationship between Mr. McCargar's complaints and his 1979 injury.

It is correct that the Board doctors were of the opinion that Mr. McCargar's complaints were not related to his 1979 or 1980 injuries. However, two of the Board doctors' opinions were based partly on what the Board referred to as Mr. McCargar's inconsistent statement - that he had recovered from his 1979 injury without any pain. The two doctors failed to refer to other evidence that his

back had been sore off and on since the 1979 injury. Therefore, their opinions apparently were not based on all available evidence. The third Board doctor felt that there was not adequate evidence to support a relationship between the 1980 accident and Mr. McCargar's symptoms regarding hospitalization, nor any apparent relationship between his 1979 accident and later problems. However, she did not and could not consider the report of Mr. McCargar's surgeon which was not yet available, in coming to this conclusion. In my opinion, the surgeon's report provided adequate evidence to support such a relationship. It was my belief that the medical opinions which had to be balanced were those of one Board doctor, who based her opinion on a file review, and of Mr. McCargar's surgeon.

I therefore concluded that the Board's decision to disallow Mr. McCargar's 1980 claim as a new incident which aggravated his pre-existing condition resulting from his 1979 accident was unjust. In this case I believe the Board has drawn incorrect inferences of fact from the evidence.

Report to the Cabinet and Meeting with the Chairman of the Workers' Compensation Board

After submitting my report of this case to the Cabinet on March 27, 1985, I met with Mr. Flesher, Chairman of the Workers' Compensation Board to discuss personally my findings and recommendation. That discussion did not result in any change in the Commissioners' decision to reject my recommendation.

Aftermath

Mr. McCargar's work accident, his resulting disability, and the Board's refusal to accept his claim have had a devastating impact on his life. Prior to Mr. McCargar's first work injury at age 18, he

had worked for approximately three years after leaving school at the end of grade 9. His work experience consisted primarily of physically demanding, unskilled jobs which he was able to obtain with his limited education and no doubt assisted by a more buoyant economy. After his second work injury and surgery, he continued to work for his employer who allowed him to work at lighter duties. This arrangement continued until the company went out of business. Mr. McCargar then found light work with another employer, who unfortunately also went out of business after a few months. Since that time, Mr. McCargar has been unable to find steady employment within his physical capabilities. His employment options, already restricted by his level of education, have become even more restricted because of his back condition. The Board has not assisted him in any retraining or rehabilitation program so that he can again be productively employed. As a result, Mr. McCargar, at age 25, is now unemployed and on welfare.

Recommendation

That the Board accept Mr. McCargar's 1980 claim as an aggravation of his pre-existing condition resulting from his 1979 accident.

Anticipated Impact

Payment of Mr. McCargar's wage loss benefits and medical expenses resulting from his 1980 claim, and consideration for a permanent disability award.

Mr. Terrence Forrest

The issue in Mr. Forrest's case is whether his worsening condition, which caused him to stop working in September, 1971, was related to his original work accident of August 17, 1970.

Investigative Findings

Mr. Forrest was a worker with a steady work history in the wood and service industries going back many years. On August 17, 1970 he injured the right side of his lower back and right hip at work in a plywood manufacturing plant, where he had been employed for the past four years. The Board accepted his claim and paid him wage loss benefits for approximately five months. He attempted to return to work in January 1971, but was able to work only three days. Mr. Forrest's doctor suggested that he start working a four hour shift and gradually progress to a full shift. After an initial two weeks of light work four hours daily, Mr. Forrest started an eight hour shift performing heavier work on March 1, 1971. One of the reasons why Mr. Forrest states he started an 8 hour shift on this date is that, after two weeks on a four hour shift, he was told by his employer that he should either return to an eight hour shift or return to compensation. The other reason was that he was managing with a four hour shift and he understood a Board employee to have told him that if a problem recurred, his claim would be reopened.

Mr. Forrest continued working an eight hour shift until September 30, 1971 when he ceased working. He then reported to the Board that he was having further trouble with his back and wished to reopen his claim. The adjudicator denied Mr. Forrest's claim. He wrote that Mr. Forrest had almost completely recovered from his 1970 injury and medical reports on file before he returned to work did not show that he was incapable of carrying out his duties.

Mr. Forrest appealed this decision to the old boards of review. They denied his appeal. Mr. Forrest was not able to return to work. Since 1972 Mr. Forrest has been in receipt of a handicapped pension from the Ministry of Human Resources as a result of his spinal problems and deafness in one ear.

Grounds for Preliminary Recommendation

I found that the Board's decision to refuse the reopening of Mr. Forrest's claim in October 1971 was unjust as it failed to consider relevant factors. I believed that the Board had missed two important considerations. First, Board medical staff did not completely share the opinion of the adjudicator that Mr. Forrest had almost recovered from his August 1970 injury. Board doctors suggested that he exercise for the rest of his life and believed that he was left with some chronic back ache which could go on indefinitely. The Board doctor also felt he would require some assistance in obtaining a suitable job in the plant where he had been employed for nearly five years. These comments are consistent only with the conclusion that Mr. Forrest had not fully recovered.

Secondly, Mr. Forrest's doctor had reported to the Board prior to Mr. Forrest's return to work that Mr. Forrest's back pain was aggravated by sitting and working. Mr. Forrest had stated that he walked approximately eight miles a day during his eight hour shift and that much of the walking was in fact running. Therefore, the job Mr. Forrest performed required movements which his doctor noted aggravated Mr. Forrest's pain. I initially recommended that the Board reopen Mr. Forrest's 1970 claim effective October 1, 1971 and assess him for a disability award.

The Commissioners' Reply

The Commissioners did not agree with my findings for several reasons.

1. They wrote that the Board doctors' reports I referred to did not contradict the Claims Adjudicator's decision because, they stated, the reports were made two months prior to Mr. Forrest's return to work.

2. They stated that the reports' significance became questionable because Mr. Forrest's own doctor had reported that Mr. Forrest would recover and return to his job. The Commissioners interpreted the subsequent report of Mr. Forrest's doctor to mean that he was recommending a procedure for attaining recovery, and pointed out that Mr. Forrest did in fact return to his normal work and was able to do this normal work for the following six months.

3. They did not agree that the nature of Mr. Forrest's work after March 1, 1971 would have aggravated his condition.

4. They stated he never referred his later complaints to his work in this period and had stated to the Board that there was no new incident or injury in this period of time.

5. Mr. Forrest's low back problems were probably caused by an off-the-job accident which had produced some neck pain.

Comment on the Commissioners' Reply

1. The reports of the Board's doctors were important as they demonstrated that, over the course of Mr. Forrest's treatment prior to his return to work, the Board doctors did not expect him to recover completely from his injury.

2. Although his own doctor expected he would improve satisfactorily and would eventually return to his job, in his subsequent report the same doctor stated that after Mr. Forrest had returned to work for three days his pain had returned and remained with him. The doctor explained that he expected that after this relapse Mr. Forrest would be able to carry on with the light work that he felt would be possible to arrange. However, as noted, Mr. Forrest only performed light work for the following two weeks.

   In my opinion, although the doctor may have recommended light work to aid in Mr. Forrest's recovery, it is clear that Mr. Forrest did not recover as his pain gradually increased in the following six months.

3. Mr. Forrest did not return to his "normal" work but rather to a lighter job of carrying and turning 4 x 8 sheets of veneer. His previous job was that of an assistant hot press operator, which was heavier work in that it involved more pushing and lifting. It is significant that Mr. Forrest's doctor has also stated that if Mr. Forrest's work aggravated his condition, his pain would be gradually worsening during the time he was performing his job. Mr. Forrest had reported to the Board that after March, 1971 he suffered pain infrequently at first, but by the end of August 1971 the pain was present on a daily basis, worsening so that the pain became constant. His pain increased as he continued to perform a job which consisted of movements (walking) which his doctor had noted aggravated his pain.

4. The fact that Mr. Forrest did not refer his later complaints to his work was not surprising in view of the fact that Mr. Forrest was not asked by the Board what he referred his complaints to and he did not comment on this issue one way or the other. However,

the fact that Mr. Forrest contacted the Board in September 1971 because of his increasing pain at work and requested a reopening of his claim would demonstrate his belief that his pain was related to either his work activity, his previous work accident, or a combination of the two. The fact that there was no new work incident after March, 1971 should not prohibit the Board from allowing a reopening of Mr. Forrest's claim. It should be re-opened because his worsening condition after September 1971 was a result of his previous work injury, from which he had not fully recovered, combined with a work activity which aggravated this unresolved condition.

5. Mr. Forrest only related his low back, hip, and leg pain to his 1970 work accident. He never attributed his shoulder blade and neck pain to his work accident. There is no evidence that his neck pain is related to his low back pain. It is a separate issue.

Conclusion

In my opinion, the Board's refusal to reopen Mr. Forrest's claim in October 1971 is an unjust decision because it failed to consider relevant factors. These relevant factors included the facts that Mr. Forrest's condition had not resolved when he returned to his work; that medical opinions prior to and after his return to work stated that he should seek suitable or light work; that Mr. Forrest only performed light work for two weeks before being told by the employer to return to heavier eight hour shifts; and that this job necessitated walking eight miles a day, a movement which Mr. Forrest's doctor noted aggravated his pain.

Report to the Cabinet and Meeting with the Chairman of the Workers' Compensation Board

After submitting my report of this case to Cabinet on April 2, 1985, I met with Mr. Flesher, Chairman of the Workers' Compensation Board, to personally discuss my findings and recommendations. That discussion did not result in any change in the Board's position.

Aftermath

Mr. Forrest's work accident, his resulting disability and the Board's refusal to recognize his disability as work-related have drastically changed Mr. Forrest's life.

Prior to his accident, Mr. Forrest had worked full-time for 26 years. He has a grade 7 education. He intended to stay with the employer for which he worked for the 4 years prior to his injury, and had this been possible, he would have been eligible to receive a company pension when he retired. Instead, after the Board refused to reopen his claim in 1971, Mr. Forrest was physically unable to continue at his job. He initially received sick pay benefits, then welfare and for the past several years, a handicapped pension from the Ministry of Human Resources. He states he has been unable to work since 1971. Whether he would have been able to work if he were retrained for lighter work is unknown, as the Board did not offer him any rehabilitation assistance. His four children were between the ages of 7 and 14 when Mr. Forrest was injured, and he was unable to provide them with any "extras" when they were growing up. He has not been able to afford a holiday for 15 years and does not go out. He is now 57 years old, and feels bitter about the life which has resulted from his disability and the Board's refusal to accept his claim.

Recommendation

That the Board re-open Mr. Forrest's 1970 claim effective October 1, 1971 and assess him for a disability award.

Anticipated Impact

Temporary wage loss benefits from October 1, 1971 until Mr. Forest's condition had stabilized, and a permanent partial disability award.

Mr. Wilhelmus Chatrer

The issue in Mr. Chatrer's case is whether work-related injuries aggravated an existing back condition, thereby contributing to his need to have a spinal fusion.

Investigative Findings and Preliminary Recommendation

Mr. Chatrer has had eight compensable injuries involving his low back. All have been accepted by the Board. On the day of his first work injury in 1962 an x-ray showed some minor degeneration of his spine, then described by a Board doctor as "nothing very remarkable about this in a man 39 years of age". He had not had any previous back problems or treatment. By 1966 Mr. Chatrer's specialist reported to the Board that Mr. Chatrer was increasingly incapacitated as a result of a change in the structural anatomy of his discs which dated back to the 1962 injury. The specialist stated that Mr. Chatrer would ultimately require the removal of his lumbo sacral disc and a spinal fusion. By this date, Mr. Chatrer had suffered five work injuries to his lower back. He underwent a spinal fusion in 1967. The Board denied responsibility for the fusion claiming that it did not result from his 1962 and subsequent injuries.

I initially concluded that the Board's refusal to accept responsibility for Mr. Chatrer's fusion was unjust as it failed to consider a relevant factor. The Board relied mainly on the x-ray evidence of degenerative disc disease prior to Mr. Chatrer's 1962 work injury. It failed to consider whether the 1962 accident or subsequent accidents had permanently aggravated Mr. Chatrer's condition. I recommended that the Board consider whether Mr. Chatrer's 1962 injury or subsequent injuries permanently aggravated his pre-existing condition, thus contributing to the need for a spinal fusion in 1967. I also recommended that Mr. Chatrer be assessed for a disability award if aggravation existed.

Commissioners' Reply: Further Investigation

The Commissioners had Mr. Chatrer's file reviewed by the Board's orthopedic consultant and then concluded that there were insufficient grounds to reconsider the previous Board's decision (that the spinal fusion was not the result of Mr. Chatrer's 1962 or subsequent injuries).

My office then contacted the orthopedic surgeon who had treated Mr. Chatrer in the 1960's and 1970's, as well as the orthopedic surgeon who performed the fusion in 1967. The latter believed that the degeneration was aggravated by Mr. Chatrer's work accidents. The former orthopedic surgeon, who had already given the opinion that Mr. Chatrer's structural change at the lumbo sacral level dated back to his 1962 work injury, did not change his opinion even after reviewing the report of the Board's orthopedic consultant. In addition, Mr. Chatrer's family physician gave the opinion that Mr. Chatrer's back injuries could have had a cumulative effect resulting in the advancement of his degenerative disc disease.

Final Report and Recommendation

In my opinion the preponderence of the medical evidence supports the conclusion that Mr. Chatrer's work accidents permanently aggravated his pre-existing degenerative condition and contributed to the necessity of a spinal fusion. I recommended that the Board assess Mr. Chatrer for a disability award to compensate him for any disability resulting from the spinal fusion of 1967, reimburse him for his medical expenses associated with the spinal fusion and pay any wage loss benefits due to him as a result of the fusion.

Commissioners' Reply

In response, the Commissioners claimed they had rectified any fault that might have existed in the prior Board decision by obtaining a report from their orthopedic consultant. The Commissioners stated that the opinion of the Board's orthopedic consultant was a reasonable one which was supported by the available evidence.

Comment on the Commissioners' Reply

Whether the Board doctor's opinion was a reasonable one or not, he is the only doctor who has given such an opinion. Three other medical opinions are to the contrary. Their opinions are also reasonable. The Board has not properly addressed my conclusion that the preponderance of the medical evidence is in Mr. Chatrer's favour.

Shortly before the Board rejected my recommendation, my staff suggested that the Board at least refer the medical question at issue in Mr. Chatrer's case to a Medical Review Panel. The Board also refused this possible resolution as not acceptable.

Report to the Cabinet and Meeting with the Chairman of the Workers' Compensation Board

On April 3, 1985 I submitted a report with respect to Mr. Chatrer's case to the Cabinet. Subsequently, I met with Mr. Flesher, Chairman of the Workers' Compensation Board, to personally discuss my findings and recommendation. Although the weight of the medical evidence supports Mr. Chatrer, Mr. Flesher stated he was reluctant to go against the opinion of the Board's Orthopedic Consultant, whom the Board highly respects. Instead, Mr. Flesher suggested that the Board refer Mr. Chatrer's case to a Medical Review Panel or obtain yet

another opinion from an outside specialist. I do not believe that, after denial of a pension from the Board over the 18 years since his fusion, and having the preponderance of the medical evidence in his favour, Mr. Chatrer should be further delayed in receiving the benefits to which he is entitled. Although my staff suggested the possibility of a Medical Review Panel to the Board when it was clear that my original recommendation would be rejected, that suggestion was made in January 1985 and was also rejected by the Board. Almost 5 months have passed since then, and now Mr. Flesher has suggested a Medical Review Panel or an opinion from an outside specialist. It seems these suggestions have been made because of the Board's reluctance to go against the opinion of one Board doctor, notwithstanding the medical opinions to the contrary. The Board has now set up an appointment for Mr. Chatrer to be examined by an outside orthopedic specialist in order to obtain yet another opinion. This further step is not warranted in view of the evidence clearly supporting Mr. Chatrer's claim. Mr. Flesher has not explained why it is necessary to obtain yet another medical opinion rather than accept my recommendation. In my opinion, the fact that this step is being taken only demonstrates that the Board's refusal to accept my recommendation is unreasonable.

Aftermath

At the time of his 1962 work accident, Mr. Chatrer was a diesel mechanic, a trade he had worked at for a number of years. After his fusion operation in 1967, Mr. Chatrer could no longer perform the heavy aspects of his job and so was laid off in 1968. For the next 13 years, he worked for another company, starting as a clerk and eventually progressing to be a supervisor. However, he states that even the highest wages he earned at this company were less than what he could have earned as a diesel mechanic. A few years ago, at the

age of 59, he lost his job because of economic cut-backs and has not been able to obtain work to date. Since that time, he has been living off his retirement savings, a small pension from his past employer, and recently a Federal government disability pension.

Recommendation

That the Board assess Mr. Chatrer for a disability award to compensate him for any disability resulting from the spinal fusion of 1967, reimburse him for his medical expenses associated with the spinal fusion and pay any wage loss benefits due to him as a result of the fusion.

Anticipated Impact

Payment of retroactive disability award, wage loss benefits and any medical expenses.

APPENDIX A

Summary of Recommendations

Case No. 1 - Mr. Peter Cheveldave

That the Board accept Mr. Cheveldave's claim.

Case No. 2 - Mr. Perry Swistak

That the Board compensate Mr. Swistak for the time loss he incurred as a result of his right inguinal hernia.

Case No. 3 - Mr. Craig McCargar

That the Board accept Mr. McCargar's 1980 claim as an aggravation of his pre-existing condition resulting from his 1979 accident.

Case No. 4 - Mr. Terrence Forrest

That the Board re-open Mr. Forrest's 1970 claim effective October 1, 1971 and assess him for a disability award.

Case No. 5 - Mr. Wilhelmus Chatrer

1. That the Board assess Mr. Chatrer for a disability award to compensate him for any disability as a result of a spinal fusion in 1967.

2. That the Board reimburse Mr. Chatrer for his medical expenses associated with his spinal fusion, and pay a wage loss benefits due him as a result of the fusion.

APPENDIX B

Correspondence

Table of Contents

Case No. 1 - Mr. Peter Cheveldave	Page 1
Case No. 2 - Mr. Perry Swistak	Page 18
Case No. 3 - Mr. Craig McCargar	Page 33
Case No. 4 - Mr. Terrence Forrest	Page 54
Case No. 5 - Mr. Wilhelmus Chatrer	Page 75

Legislative Assembly
Province of British Colu bia

OMBUDSMAN

202, 1275 West Sixth Avenue
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British Columbia
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000001

File: 83-51438

February 17, 1984

Mr. W. Flesher,
Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Complaint of Mr. Peter Cheveldabe, Claim #NC80203315

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl. (1)

PRELIMINARY REPORT

pursuant to Section 16 of the Ombudsman Act

Opportunity to make representations

16. Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter.

- Ombudsman Act, R.S.B.C. 1979, c. 306

Complainant: Mr. Peter Cheveldabe, Claim #NC80203315

Authority: Workers' Compensation Board

Background:

On May 18, 1979 Mr. Cheveldabe had a non-compensable repair of a right inguinal hernia. In October 1980 Mr. Cheveldabe was working at Korpack Cement Block Plant as a General Maintenance Worker. On October 20, 1980 Mr. Cheveldabe and his foreman were carrying a 60 lb roll of plastic. While maneuvering around some obstacles he felt pain in his groin area which caused him to stop and rest. This pain was ultimately diagnosed by Dr. [redacted] as a right inguinal hernia.

Employer Involvement:

Mr. Cheveldabe's employer disputed the claim on the Form 7, dated October 27, 1980. I have therefore contacted the employer concerning my possible recommendation.

Last Decision Level:

On May 21, 1982 the Commissioners denied the appeal of Mr. Cheveldabe. Their reasons were as follows:

1. Hernia's commonly recur within 18 months and as the original hernia was non-compensable then so was the recurrence.

2. The foreman did not recall any complaint by Mr. Cheveldabe.

3. The complaint was not received until the end of the shift.

(I note in passing that the Commissioners made a mistake of fact by describing the injury as bi-lateral when in fact it was a right hernia. As this is not determinative of the matter I do not base my recommendations on this.)

Complaint:

Mr. Cheveldabe states that his 1980 right inguinal hernia was a result of a work related activity but the Board refuses to accept any responsibility for it.

Issues:

1. Did the Board act unjustly by making a decision based on insufficient evidence with regard to the conflict between Mr. Cheveldabe's account of the injury and the account of the employer?

2. Did the Board act unjustly in denying Mr. Cheveldabe's claim on the basis of the Board's policy regarding recurring hernias?

Grounds for Adverse Finding:

I may find Mr. Cheveldabe's complaint substantiated on the following grounds:

Issue #1

Did the Board act unjustly by making a decision based on insufficient evidence with regard to the conflict between Mr. Cheveldabe's account of the injury and the account of the employer?

1. What is the evidence relating to the occurrence of Mr. Cheveldabe's hernia on October 20, 1980? In a supplement to his Form 6 Mr. Cheveldabe described in detail and with a diagram the account of his injury. He was at the rear of a 60 lb roll of plastic, and his foreman, Mr. [redacted], was at the front as they manoeuvered around some piles of branches. The report states, "As I was at the rear of the load and the man in front was making fast and sudden movements or manoeuvers I had to absorb several sudden jars". He noticed a sudden pain and immediately put his end of the load onto a pile of branches. "Mr. [redacted] was well aware of my sharp and sudden pain", according to Mr. Cheveldabe. After pausing for a few seconds Mr. Cheveldabe and his foreman completed the moving of the plastic roll. Apparently there was some rush for this work as Mr. Cheveldabe's foreman had left his forklift running and was reluctant to take the time to help Mr. Cheveldabe.

2. The incident in question occurred at 9.15 a.m. and Mr. Cheveldabe reported to his employer at 3.30 p.m. the same day. He reported on his Form 6 that he was able to work until lunch when he realized that "the injury was more than just a short sharp pain". At noon he went to Rossland hospital and arranged to see Dr. [redacted] at 4.30 p.m.

3. On October 20, 1980 Dr. [redacted] completed a Physician's First Report with a diagnosis of "recurrent R. IH" as a result of "lifting heavy roll of plastic".

4. On October 27, 1980 the Manager of Korpac, Mr. [redacted], stated on the Form 7: "...Mr. [redacted] states that Mr. Cheveldabe did not inform him at the time of any injury. Mr. Cheveldabe demonstrated to me at 3.30 the type of activity that a person with his injury (a hernia) could not do, and he was able to do these acts as demonstrated."

5. In memo #1 the Claims Adjudicator reported that the employer had phoned "to express his concern about the claim". The employer had "interviewed the foreman, Mr. [redacted], who was working with Mr. Cheveldabe carrying the plastic and there was no report of injury while the claimant was carrying the plastic."

6. On October 29, 1980 the Claims Adjudicator wrote to Mr. Cheveldabe rejecting his claim for compensation. One of the reasons was that there was "no information that would indicate that there was any severe direct trauma or marked increased interabdominal pressure which could account for the recurrence."

7. In an undated response to the Claims Adjudicator's decision letter Mr. Cheveldabe stated that his work at Korpac was completed shortly after his accident. He reported his injury to his employer (i.e. to Mr. [redacted] and his wife. [redacted] is the partner of [redacted].) early in the afternoon of October 20, and explained he would only be able to work slowly.

8. On November 28, 1980 Dr. [redacted] completed an Attending Physician's Statement and reported "yes" to question 2: "Is condition due to injury or sickness arising out of patients employment?"

9. In a letter to my office, dated December 7, 1983, Dr. [redacted] stated: "There is certainly a very clear history of having exerted a considerable force in the groin area while at work..."

Conclusions on Issue #1

1. Decision 316 states that "lifting and straining are common causes" of increased intra-abdominal pressure, and "most often there is no urgency about the operation and seldom is there need to stop work while awaiting surgery". (pages 43-44).

2. In a report prepared for the Workers' Compensation Board, Morbidity and Audit Study of Hernia Claims, dated March 6, 1977, C.N. Robertson, M.D., it is stated that "longest mean time lost is associated with incidents describing pulling, pushing, a twist-lift, and the stresses of overcoming a fall while under stress." (page 12)

3. Section 53 of the Workers Compensation Act requires that a worker notify "as soon as practicable" an appropriate representative of the employer unless it can be shown that the employer knew of the injury without being told.

4. The work activity as reported by Mr. Cheveldabe is capable of causing a hernia.

5. As described in decision #316 there is reason to believe that Mr. Cheveldabe would have been able to demonstrate the work activity that brought about his injury to his employer without major discomfort or aggravation. Mr. [redacted]'s statement that Mr. Cheveldabe could perform this type of activity is therefore not conclusive evidence that there was no injury.

6. While Mr. Cheveldabe's account does not state that he made a verbal statement of his pain when carrying the plastic roll he does indicate that he had to set down the load and Mr. [redacted] was aware of his pain. This is not inconsistent with the employer's report that Mr. Cheveldabe did not inform Mr. [redacted] at the time.

7. Mr. Cheveldabe notified his employer "as soon as practicable" at 3.30 p.m. This was because Mr. [redacted] was at another job during the afternoon and, according to Mr. Cheveldabe, Mr. [redacted] was a working foreman so that he was driving a truck or operating the batch plant.

8. The evidentiary basis of the findings that Mr. Cheveldabe did not report the accident in time is Mr. [redacted]'s interpretation of what Mr. [redacted] told him. Moreover, Mr. [redacted]'s evidence does not answer the assertion that Mr. [redacted] was aware of the fact that Mr. Cheveldabe suffered a pain. There is no evidence on file that the Claims Adjudicator contacted Mr. [redacted] or Mr. [redacted]. He apparently accepted the account of the employer without further investigation.

9. I may therefore conclude that the Board acted unjustly by making a decision based on insufficient evidence with regard to the conflict between Mr. Cheveldabe's account of the injury and the account of the employer.

Issue #2

Did the Board act unjustly in denying Mr. Cheveldabe's claim on the basis of the Board's policy regarding recurring hernias?

1. Decision #316 states, "If the hernia recurs at the site of repair at a prior hernia within 18 months, it will be adjudicated as a recurrence of the original hernia. If it occurs later than 18 months after the surgery for the original hernia, it will be adjudicated as a new claim." (page 45)

2. What is the purpose of this "18 month rule"? In a Board report, Morbidity and Audit Study of Hernia Claims, March 6, 1977 (cited in footnote 1 of Decision #316), Dr. Robertson suggests that a definition of recurrent hernias is "required as being essential to the proper administration of hernia claims." (page 15). The assessment of recurrent hernias are discussed as being an administrative issue relating to the organization of Board finances. Two problems are identified: first, that treating a recurrence as an automatic reopening may create problems where the worker has changed employers and the wrong employer is assessed the cost (page 13); second, the question of reopening would affect the amount of wage loss: if the hernia is treated as a recurrence, then wage loss would be based on the worker's income at the time of the original injury, but if the hernia is treated as a new claim, then wage loss would be based on the worker's income at the time of the new injury (page 19).

3. What is the evidence related to the alleged recurrence of Mr. Cheveldabe's hernia? On May 18, 1979 Dr. [redacted] repaired Mr. Cheveldabe's right inguinal hernia. This was a non-compensable injury. On October 20, 1980 Mr. Cheveldabe had another right inguinal hernia.

4. In his decision letter of October 29, 1982 the Claims Adjudicator stated: "If a hernia recurs within 18 months of repair, it is adjudicated as a recurrence of the original injury. Since your original hernia was not compensable, responsibility for the recurrence cannot be accepted."

5. This conclusion was upheld at the boards of review (August 5, 1981) and at the Commissioners (May 21, 1982).

6. On November 28, 1980 Dr. [redacted] submitted an Attending Physician's Statement with a diagnosis of "recurrent R. inguinal hernia".

7. In a letter to my office dated December 7, 1983 Dr. [redacted], the attending surgeon, states: "The hernia was not a recurrence which just occurred spontaneously but did occur through a strain to the groin in the course of Mr. Cheveldabe's work. It is medically quite possible to have a hernia repaired and then to have it subsequently aggravated by another event and this does not occur uncommonly, the usual reason being due to excessive straining of the groin caused by heavy lifting. These recurrences may occur at any time following the repair of a hernia and to make an arbitrary 18 month rule seems to be unfair to the workman. The only instance that I can think that the 18 month rule might cover would be in the case of where a hernia occurs without a significant history of groin strain. I would concur that in that case it might be reasonable not to compensate the worker as there would be no evidence that the recurrence occurred from any incident in the workplace." (emphasis added)

Conclusions on Issue #2

1. Mr. Cheveldabe's right inguinal hernia on October 20, 1980 occurred 17 months and 2 days after the first hernia repair of May 18, 1979.

2. If there had been no 1979 injury the October 20, 1980 injury would be compensable.

3. The purpose of Dr. Robertson's discussion of recurrent hernias (Morbity and Audit Study of Hernia Claims) appears to be to assist decisions where the original claim is compensable and the choice is between reopening an old claim or opening a new claim. The importance of this choice relates to assessing the relevant costs to the proper employer. It also affects the proper amount of wage loss.

4. There is no indication in Dr. Robertson's study nor in Dr. Farish's Medical Factors in Hernia Claims, May 1, 1977, (see Footnote 1, Decision 316) that there is a medical justification for the "18 month rule".

5. The consequence of applying this "rule" in a case such as Mr. Cheveldabe's is that a worker cannot have a compensable aggravation of a non-compensable pre-existing hernia. If the hernia occurred before 18 months, it would be a recurrence and non-compensable. But if it occurred after 18 months it would be a new claim. Because there can only be a new claim for compensation purposes aggravation is effectively denied as a ground for a claim.

6. Dr. [redacted] is of the opinion that it is medically possible to have a subsequent aggravation that is a result of excess straining of the groin caused by heavy lifting. He further states in his letter to my office: "I can see no medical justification at all for holding that a hernia which recurs within 18 months of a prior injury is a recurrence whereas the same injury occurring later than 18 months after the injury is a new injury. The time limit seems totally arbitrary and if one can show that there has been an injury occurred in the work place resulting in the hernia occurring then I think this should be classed as a new injury and therefore compensable."

7. There is authority in Larson's that states that where a worker suffers a hernia while bending over to untie his shoes while changing his clothes before starting work he is entitled to compensation although he had two prior hernia operations in the same place. (Larson's Workmen's Compensation, 1981, Vol. 1, Sec.12.10. (emphasis added)

8. I may conclude that there is no medical justification for holding that a hernia which occurs within 18 months of a prior injury is a recurrence and is not compensable, whereas if the same injury occurs later than 18 months afterward it is a new injury. The Board's policy rather is based primarily on administrative considerations. It therefore results from the application of a wrong governing principle.

9. I may therefore conclude that the Board acted unjustly in denying Mr. Cheveldabe's claim on the basis of its policy regarding recurring hernias.

Recommendations:

I have not reached a final conclusion in this matter. However, I am considering the following recommendations:

1. That a proper investigation of the issue whether the injury occurred in the course of employment be undertaken.

2. That the Board reconsider its policy with regard to recurrent hernias and particularly with regard to how that policy affects workers who have a subsequent hernia in the same area as a previous non-compensable hernia.

3. In light of that reconsideration, if the investigation recommended above results in a different conclusion, that the Board reconsider Mr. Cheveldabe's claim as an aggravation of a pre-existing hernia.

Karl A. Friedmann
Ombudsman

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway
Richmond, B C
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OFFICE OF THE COMMISSIONERS

10 April 1984

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 83-51438

Dear Sirs:

RE: Peter CHEVELDAVE
Claim No. NC80203315

Your letter dated February 17, 1984, has been considered by the Commissioners.

The Commissioners have decided to carry out investigation in response to the points you have raised. You will be contacted again when this has been done.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

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28 September 1984

Dr. Karl A. Friedmann
Ombudsman
Legislative Assembly of
British Columbia
#202 - 1275 West 6th Ave.
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

Re: Peter CHEVELDAVE
Claim No. NC80203315

Further to my letter of April 10, 1984, the additional investigation requested by the Commissioners has been carried out.

I enclose copies of Dr. [redacted]'s report of April 18, 1984, and the report of the Field Officer, [redacted], dated June 14, 1984, together with the transcripts of the interviews he carried out.

It appears to the Commissioners that your letter indicates a lack of proper understanding of the Board's policy on the recurrence of hernias. They would point out to begin with that this policy is one that can be advantageous to claimants since it does not only apply to occurrences of non-compensable hernia occurring at work, but also to recurrences of compensable hernias occurring out of work. The second point that has to be made is that the policy does not, as you appear to suggest, mean that a new injury which causes a recurrence within the 18 months period is ignored. If the Board is satisfied that the recurrence was caused by a new injury and that new injury occurs at work, compensation will be paid. On the other hand, if the new injury which produces the recurrence occurs outside of work, no compensation is payable.

.../2

Re: Claim No. NC80203315 28 September 1984

Turning now to the facts of Mr. Cheveldave's claim, the Commissioners consider that the Board's existing decision is a proper one. Not only did the recurrence of the hernia occur within 18 months of the previous surgery, but there is a lack of evidence to support Mr. Cheveldave's statements that a new injury occurred. Mr. [redacted] has interviewed Mr. Cheveldave's foreman and employer at the time of the alleged incident, and they appear to confirm the evidence given by them at the time. Dr. [redacted] does not consider it likely that the alleged work incident would have produced the hernia. The Commissioners have concluded that the Board's decision to deny this claim was a reasonable one for which there was supporting evidence and the recent investigations provide no grounds for reconsidering that decision but rather support it.

In the result, the Commissioners are unable to agree with your proposals either with respect to this claim or with regard to the Board's policy.

Yours truly,

N.C. ATTEWELL
Secretary to the Board

NCA:hb

Legislative Assembly
Province of British Columbia

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202 1275 West Sixth Avenue
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000012

File: 83-51438
October 9, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Peter Cheveldabe, Claim No. NC80203315

I have received Mr. Attewell's letter of September 28, 1984 and I have considered the memoranda referred to in that letter. This letter is my response to Mr. Attewell's letter and the Board memoranda.

The first memorandum is by Dr. [redacted] and relates to the medical issue in this case. I had recommended that the Board reconsider its policy with regard to compensation of recurrent hernias when the first hernia was non-compensable. The significant portion of his memo, in my view, is as follows:

> ...it must be said that the vast majority of cases of recurrence will manifest themselves within three months and certainly six months. In fact, in many the recurrence is either apparent or there are findings to create some suspicion at the examination six to eight weeks postsurgery. ...the figure of eighteen months was chosen with the hope that this would cover virtually all cases.

I would certainly agree that the original intention of Decision 316 was to give the "benefit of the doubt" to the worker by covering "virtually all cases".

However, the problem raised by Mr. Cheveldabe's situation comes about because the original injury was not compensable. My concern is that the policy that applies to a recurrence of a compensable hernia should not be applied to recurrence of a non-compensable hernia. As my Report concludes, to apply it to a non-compensable hernia is effectively to deny the issue of aggravation. When the recurrence is from a compensable hernia, the figure of eighteen months may be a generous period of time. But where the original hernia is non-compensable, then the eighteen month figure works to the detriment of the worker. By attempting to cover virtually all cases where the original injury was compensable the eighteen month figure operates effectively to deny claims where the original hernia was non-compensable.

Dr. [redacted] does not address this issue directly but attempts to say that the precipitating incident is more significant. He uses examples of two extreme situations for this purpose. However, an example more to the point would be one where a person, because of an undisputed work-related activity, suffers a hernia in the area of a previous non-compensable hernia that occurred within eighteen months of the first injury. The Board's position, as I understand the application of Decision 316 in Mr. Cheveldabe's case, would be that the second injury was not compensable because it was a recurrence of a non-compensable hernia. It is my opinion, supported by Dr. [redacted], that this is arbitrary and medically unsound.

Perhaps one problem here is that the facts of this case do not lend themselves to a clear definition of the medical issue. The issue of whether the recurrence was work-related is, admittedly, not clear-cut. But I believe that this should not confuse the issue of applying the "eighteen month rule" when the original hernia was non-compensable.

Therefore I do not read anything in Dr. [redacted]'s medical opinion that contradicts the conclusions of my preliminary report.

The second memorandum I have considered is the one prepared by Mr. [redacted], a Field Investigator. Mr. [redacted]' memo was prepared after taking a Statement Under Oath from two witnesses of the events of October 27, 1980: Mr. [redacted] and Mr. [redacted]. I have also considered the transcripts of the specific interviews with the two witnesses. Mr. [redacted]' memo by itself is a matter of some concern to me because I believe he may have misrepresented the evidence taken during the interviews. Mr. [redacted], in his memo, states that Mr. [redacted]'s recollection was that "...there was no pile of brush, etc. that they had to move around or over when they were carrying the plastic". In fact, Mr. [redacted] recounted that there were stacks of wooden pallets about chest high that Mr. [redacted] and Mr. Cheveldabe had to negotiate as they were "winding (their) way through the pallets." (page 3, 6, 7, 8) Mr. [redacted] also states in his memo that Mr. [redacted] "...seems sincere in his information and has absolutely nothing to gain by telling any other information." In fact, Mr. [redacted] stated, without being asked, that:

> ...I got a bum foot...I'm on compensation. ...I mean the company has been pretty good to me, like sometimes I can't even make it a week at work, take a day off and I get $91.00 pension...so I don't want to go against the company. I can't go against the Compensation Board. ...I can't go against, I don't want to disturb any...any disturbance of any kind.

My concern with Mr. [redacted]' synopsis of the evidence he collected is that he does not accurately reflect the evidence that is detailed in the specific transcripts. This becomes critical when the evidence relates to key matters in dispute; namely, the obstacles in the route of carrying the plastic and the credibility of a key witness.

I believe the evidence from Mr. [redacted] and Mr. [redacted] indicates the following chain of events:

1. While Mr. Cheveldabe may be somewhat eccentric, his work was above reproach. He was very careful and usually worked at a noticeably slower rate than other people. ([redacted], page 3, 8)

2. Mr. Cheveldabe had a history of hernia injury and Mr. [redacted] was aware of this history.

3. The four foot roll of plastic was "at least about 60 pounds" or "at least 80 pounds". ([redacted], page 1, 7)
Mr. [redacted] was incapable of lifting it by himself. It was carried by the two men using a 6 foot pipe through the centre of the roll and each man was carrying the load in front of him. The whole operation was awkward.

4. The whole operation was "quite fastly done" ([redacted], page 4). Mr. [redacted] apparently had his forklift running and waiting at the time.

5. The plastic, weighing about 30 to 40 pounds per man, had to be lifted chest high in order to get around a pile of pallets. Mr. [redacted] has no recollection of any piles of branches as stated by Mr. Cheveldabe.

6. Mr. [redacted] could not recall if Mr. Cheveldabe set his end of the load down for a rest. ([redacted], page 4)
Mr. [redacted], in his memo, states, "...Nor was he (Mr. [redacted]) aware of the claimant having to sit down and rest".

7. When asked whether Mr. Cheveldabe said anything about pain or being hurt, Mr. [redacted] said, "No.", and then said "I can't recall. I don't think". ([redacted], page 4 to 5)

8. Mr. Cheveldabe did not report the injury to his employer until 3:30 p.m. because Mr. [redacted] was not there until that time. Mr. Cheveldabe demonstrated the injury and type of work he could not do to Mr. [redacted]. ([redacted], page 4, 6)

9. Mr. Cheveldabe contacted Mr. [redacted] more than once in order to say, "...I can't work anymore and I ruptured my hernia because of the polytene (sic)". Mr. Cheveldabe also confronted Mr. [redacted] to ask him why he was changing his story "...when he knew that...he was injured..." Mr. [redacted] responded to Mr. Cheveldabe by saying, "What you're asking me to do is change my story and I'm just telling you the way I know it. The rest that's up to you and the Board." ([redacted], page 5, [redacted], page 5)

There is a conflict between Mr. [redacted] and Mr. Cheveldabe's recollections as to whether they were carrying their load through a stack of pallets or through some bundles of branches. This may be due to Mr. [redacted]'s memory after four years or to some mistake of identification by Mr. Cheveldabe. In any case, there were obstacles in the path and the load had to be lifted to chest level at least once. This was done quickly and awkwardly. There is, therefore, a work activity which could have given rise to the injury complained of by Mr. Cheveldabe.

I believe that the critical non-medical issue in dispute here is: Did the activity described cause Mr. Cheveldabe's hernia? Mr. Cheveldabe's evidence is that, while moving the plastic, he noticed a sudden pain and immediately put his end of the load down. He reported on his Form 6, "Mr. [redacted] was well aware of my sharp and sudden pain." Mr. [redacted]'s evidence, 4 years later, is that he couldn't recall if Mr. Cheveldabe had to set his load down. Mr. [redacted] agreed with Mr. Cheveldabe that a verbal complaint was not made at the time by Mr. Cheveldabe. Mr. Cheveldabe did report the injury to Mr. [redacted] at 3:30 p.m. The reason for this delay, according to Mr. Cheveldabe and confirmed by Mr. [redacted], is that Mr. [redacted] was a working foreman and was away until that time.

Some emphasis is put by Mr. [redacted] and by Mr. [redacted] on the fact that Mr. Cheveldabe was able to demonstrate the work activity that caused his injury without discomfort or aggravation. As my preliminary report states, Decision 316 points out that "...seldom is there need to stop work while awaiting surgery". I concluded in my report that, "Mr. [redacted]'s statement that Mr. Cheveldabe could perform this type of activity is...not conclusive evidence that there was no injury". Indeed, the fact that this type of activity can be done while awaiting surgery shows that the fact that Mr. Cheveldabe could do it is irrelevant.

I conclude, therefore, that the evidence supports a finding that Mr. Cheveldabe's injury was caused by the carrying and lifting of the roll of plastic around and over obstacles.

I am writing this letter pursuant to Section 22 of the Ombudsman Act. On the grounds that the Board's denial of Mr. Cheveldabe's claim for compensation resulted from the application of a wrong governing principle and was therefore unjust, I recommend that Mr. Cheveldabe's claim be accepted by the Board.

Yours sincerely,

Karl A. Friedmann

Karl A. Friedmann
Ombudsman

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

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15 February 1985

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: Peter CHEVELDAVE
Claim No. NC80203315

Your letter of October 9, 1984, has been considered by the Commissioners.

The first part of your letter dealing with the Board's general policy on recurrent hernias indicated that you misunderstood my letter of September 28, 1984. You still seemed to be under the impression that a recurrence within 18 months of a non-compensable hernia is not compensable regardless of whether the recurrence results from a work injury. As was explained to members of your staff in their meeting with Mrs. [redacted] on January 24, 1985, the Board's policy, in fact, is that, if the recurrence results from a work injury, the recurrence is compensable and it makes no difference whether the original hernia was compensable or non-compensable or whether it occurred more or less than 18 months after the original hernia. At the meeting, the members of your staff suggested that Decision No. 316 was not clear on this. Action is being taken to ensure that Claims Adjudicators are aware of the correct policy.

The primary consideration in the denial of Mr. Cheveldave's claim is whether the incident on October 20, 1980, in fact, occurred and, if it occurred, whether it could and did cause the recurrent hernia. The 18 month rule is only introduced as a secondary reason to point out that, since the recurrence did occur within that period, it could reasonably have occurred spontaneously without a new incident.

continued...../2

RE: Peter Cheveldave
Claim No. NC80203315

15 February 1985

With regard to the comments made by you regarding the evidence obtained by Mr. [redacted]' investigation, the Commissioners do not think there are any grounds for changing their previous decision. You appear to be suggesting on page 2 of your letter that Mr. [redacted] is not a neutral witness, but then neither is Mr. Cheveldave. He obviously wants his claim to be accepted. The evidence at the time of the injury indicated that Mr. [redacted] had no recollection of an incident such as Mr. Cheveldave described and the interview of him by Mr. [redacted] confirms that evidence. Dr. [redacted]'s recent report doubts whether the work activity in question could have caused the recurrence of the hernia. It seems to the Commissioners that the Board's decision is based on proper grounds and supported by the evidence. You conclude that the denial of the claim resulted from "the application of a wrong governing principle and was therefore unjust". However, the Commissioners feel that, in reality, there is no principle involved in this claim. It simply involves a question of fact and a weighing of the opposing evidence. The Commissioners can see no reason why your judgment as to the weighing of that evidence should be preferred to theirs.

In the result, the Commissioners have decided to reject your recommendation. Mr. Cheveldave's claim will remain disallowed.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Province of British Columbia

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British Columbia
V6H 1A6
Telephone: (604) 736-8721

000018

File: 82-6853

March 1, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Complaint of Perry Swistak, Claim No. XC80007097

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl. (1)

PRELIMINARY REPORT

pursuant to Section 16 of the Ombudsman Act

Opportunity to make representations

16. Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter.

- Ombudsman Act, R.S.B.C. 1979, c. 306

Complainant: Perry Swistak

Authority: Workers' Compensation Board

Background:

Mr. Swistak is a young man who used to work as a labourer for MacMillan Bloedel. In September of 1979 he experienced pain in his left side while he was pulling lumber off the green chain, and a left inguinal hernia was diagnosed and surgically repaired. The injury was compensable and Mr. Swistak returned to work in November of 1979.

On January 23, 1980, Mr. Swistak saw Dr. [N], his family physician, for a routine physical. An undated letter from Dr. [K], an associate of Dr. [N]'s, states that the visit was primarily because of migraine headaches, but that a weakness of Mr. Swistak's right groin was also noted at that time.

Two days later, on January 25th, Mr. Swistak returned to his physician's office because a small but definite lump had developed on his right side. He saw Dr. [K] who immediately suspected a right inguinal hernia. A referral was made to Dr. [O], who had performed the 1979 surgery, and a right inguinal herniorrhaphy was performed on February 18, 1980.

On February 25, 1980, Mr. Swistak's claim for compensation was rejected by his adjudicator at the Workers' Compensation Board. The reason given for the disallowance was that although the injury was reported to the employers on January 25th, the same day that Dr. [K] suspected the hernia, the application form filled out at that time by the doctor had given January 10th as the date of the injury. In the opinion of the adjudicator, this apparent 15 day reporting delay meant that he was unable to relate the right inguinal hernia to a work injury.

On January 8, 1981, the boards of review denied Mr. Swistak's appeal on this issue of delay, as did the Commissioners on August 18, 1981. Implicit in their denials is the opinion that, regardless of the delay issue, no hernia could be compensable unless directly related to a specific work incident. Although Dr. [O] disagrees with this limitation to the causal relationship in his November 10, 1981 letter to the Medical Review Panels, Mr. Swistak's attempt to appeal the issue to a Medical Review Panel was rejected by the boards of review on August 27, 1982, on the grounds that no medical decision was being disputed in his claim. I have to assume, then, that the only issue is whether or not a reporting delay occurred.

Decision #316 of the Workers Compensation Reporter series outlines guidelines for the adjudication of hernia claims. Most inguinal herniae are congenital, or "indirect", related to incomplete closure of the inguinal canal during late fetal development. Unlike most men suffering from herniae, Mr. Swistak was young, strong and healthy, so it was expected that both his herniae would have been indirect, but exploration during surgery demonstrated that both were, in fact, the less common "direct" herniae, related to a noticeable weakness of the abdominal wall, which could be either congenital or acquired. The medical presumption is that his herniae would have followed increases in intra-abdominal pressure from activities such as lifting or straining.

Complaint:

Mr. Swistak feels that his right inguinal hernia was caused by his employment at the mill while performing the same tasks that had caused his left inguinal hernia a few months earlier. He has consistently described his right inguinal hernia as appearing to have developed more gradually than did the one on the left, which had seemed to occur without forewarning after a single precipitating incident, but he concedes that the first injury probably made him more consciously alert for any signs of a recurrence of the problem. Nonetheless, he and his doctors agree that while there was discomfort and an area of weakness, but no hernia on the right side on January 23rd, a hernia was there on January 25th.

The apparent 15 day delay has been explained to the Board as a minor recording error on the part of Dr. [K], and Mr. Swistak does not understand why this slight error should invalidate his hernia as a work-related injury. He wonders if the misunderstanding has been perpetuated because of his lack of skill as an advocate on his own behalf.

Issue Investigated:

From the evidence available, does it seem reasonable and probable that Mr. Swistak's hernia occurred at work on January 24, 1980, as he has maintained, or did it occur on January 10, 1980, as noted by Dr. [K] on the form that he filled out on January 25, 1980.

Findings:

On January 24, 1980, Mr. Swistak finished work on the late shift and arrived home after midnight, which was actually early in the morning of January 25th. He had felt pain on his right side during the shift, and, when he arrived home, examined himself and found a definite lump. He went to his physician's office that same day, and saw Dr. [K]. A "Physician's First Report" was filled out for the Workers' Compensation Board at that time. It seems clear, from reading both that form and the "Attending Physician's Statement" from February 5, 1980, that filling out forms was not Dr. [K] 's forte, as several inconsistencies are evident on both forms. (See questions #7 and #8 on the first form, as well as question #9 and the bottom of the second form.)

As Mr. Swistak remembers the examination on the 25th, Dr. [K] asked him when he had noticed the hernia and was given the time of 1:15 a.m. in answer. This referred to the early morning of January 25th, when Mr. Swistak arrived home from his late shift. At a different point in the examination Mr. Swistak was asked when he had first felt that something was wrong. To this he had answered that he had noticed something wrong for about two weeks. Dr. [K] thus appears to have telescoped the two different occurrences together in point #1 of the Board's reporting form, and to have continued to rely upon that date. Later he telescoped events even further when he gave January 10th as the date that he first treated his patient for the condition (see the Attending Physician's statement of February 5, 1980.)

But we have more than obvious reporting errors and Mr. Swistak's retrospective reconstruction of the examination to rely on. On February 1st, long before any controversy erupted over the apparent reporting delay, Mr. Swistak saw the specialist, Dr. [O], who summarized the medical history in a letter to Dr. [K]:

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> On January 10th of this year he first experienced some discomfort in the (R) inguinal region. By January 24th the discomfort became worse and a lump was apparent and he sought your advice.

This sequence of events seemed entirely reasonable to Dr. [O], and, in a letter he addressed to the Medical Review Panel, dated November 10, 1981, he commented further:

> While one cannot be categoric about the time of injury and the appearance of a lump there is no question in my mind that there may be a significant period of time elapse, particularly from when the discomfort is first noted and a lump actually appears.

On his February 25, 1980 memo to file, in which the decision was first made to refuse the hernia claim, Mr. Swistak's adjudicator noted two factors that have to be considered before a hernia can be considered compensable. First is the question of whether or not the work activity could cause a significant increase in the intra-abdominal pressure. The adjudicator accepted that work on a green chain could do this.

Second is the question of whether or not the worker seeks medical attention promptly. Acting on the assumption that there had been a delay in Mr. Swistak's reporting of the hernia as a work injury, the adjudicator decided to disallow the claim for that reason. On February 27th, Mr. Swistak visited him and attempted to clarify the confusion over the dates, and on March 3rd the adjudicator called Dr. [N] and Dr. [K]'s office. The adjudicator's report of his conversation with Dr. [K] is rather carefully phrased:

> I spoke with Dr. [K] directly to see if he could recall or read from his notes any record of Mr. Swistak mentioning an injury occurring on January 24, 1980. Dr. [K] could not recall such a conversation nor were there any notes to this effect.

The adjudicator does not mention that Dr. [K]'s notes of January 25th were written on an appropriate W.C.B. form, and clearly did refer to a work-related incident ("Pulling boards off Green Chain and felt pain in Right Groin"). Nor was it mentioned that Dr. [K] must have relied on his notes, as the examination had taken place more than a month before, and would have thus interpreted this incident as occurring on the 10th rather than the 24th. The adjudicator's delicate selectivity leaves the misleading impression that the possibility of the hernia being work-related had simply never been considered at all during the medical examination of January 25th, and it invites the assumption that Mr. Swistak opportunistically and dishonestly attributed his hernia to his work at some much later date.

The question that should have been addressed - whether or not Dr. [K] could have written down a misleading date - was apparently never raised or explored by the adjudicator. The boards of review and Commissioners appear to have assumed that the possibility of a recording error must have been looked into. Indeed, it is so obvious as an alternative explanation (especially in light of the physician's report describing no hernia on January 23rd) that it is hard to understand why it received no investigative attention.

Grounds for Adverse Recommendation:

1. Manual labour of the sort performed by Mr. Swistak is considered capable of causing the significant increases in intra-abdominal pressure that can result in herniae.

2. A few months before developing the controversial direct inguinal hernia on his right side Mr. Swistak had developed a direct inguinal hernia on his left side while performing the same kind of labour.

3. On January 23, 1980, Mr. Swistak reported discomfort of his right side to his family physician, but the examination demonstrated weakness rather than a hernia.

4. Mr. Swistak worked the late shift on January 24th, and did not arrive home until early in the morning of January 25th.

5. On January 25th he reported to his doctor that he had experienced pain at work and had noticed the appearance of a lump. A right inguinal hernia was tentatively diagnosed and later confirmed.

6. The physician, Dr. [K], also filled out a Physician's Reporting Form for the Workers' Compensation Board on that day, describing a work-related incident.

7. Dr. [K] made some errors on forms that he filled out both then and later in his reporting of Mr. Swistak's injury.

8. On February 1st the specialist, Dr. [O], was told by Mr. Swistak that discomfort had been evident by January 10th, but no hernia diagnosed until January 25th. Dr. [O] recorded this information and found it to be a completely reasonable sequence of events from a medical stand point.

9. In view of Dr. [K]'s other errors and the medical documentation substantiating Mr. Swistak's description of the chronology I am satisfied that Dr. [K] was mistaken in

reporting that the hernia occurred on January 10, 1980. I am also satisfied that there was still no hernia on January 23rd, but that a hernia was reported to the physician and the employer on January 25th.

10. As the factual and direct medical evidence confirms Mr. Swistak's description of his injury, I find the only reasonable conclusion to be that his right inguinal hernia was a work-related injury occurring on January 24, 1980.

11. If the adjudicator had considered the possibility of a recording error on the part of Dr. [K] his decision to deny the claim was based upon insufficient evidence or on an incorrect weighing of the evidence, and was therefore unjust.

12. If, in the alternative, the adjudicator had not seriously considered the possibility of a recording error on the part of Dr. [K], he failed to take relevant factors into consideration and, again, his decision was unjust.

Notification of Employer:

I have notified Mr. Swistak's employer of our investigation as the company is experience rated and has objected to his claim in the past.

Possible Recommendation:

I have not yet reached a final conclusion on this complaint, and I would appreciate your comments on the grounds set out above. In order to assist you in focusing your response I am considering the following recommendation:

That the Workers' Compensation Board compensate Mr. Swistak for the time loss he incurred as a result of his right inguinal hernia.

Karl A. Friedmann
Ombudsman
March 1, 1984

WORKERS
COMPENSATION
BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B C
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

22 June 1984

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Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Your File: 82-6853

Dear Dr. Friedmann:

RE: Perry SWISTAK
Claim No. XC80007097

Your letter dated March 1, 1984, has been considered by the Commissioners.

You are proposing that Mr. Swistak's right inguinal hernia claim be accepted.

Having carefully reviewed all the available evidence, the Commissioners can find no grounds for reconsidering the prior Commissioners' decision of August 18, 1981, denying this claim.

A major reason for the Board's decision is the fact that the application for compensation and the Form 8 signed by Mr. [K] give the date of injury as January 10, 1980, though treatment was not sought until January 25, 1980. When the Claims Adjudicator initially disallowed the claim on this basis, Mr. Swistak then gave evidence that the injury occurred on January 24, 1980. It seems to the Commissioners that the Claims Adjudicator was understandably suspicious and reasonably sought confirmation from Dr. [K] as to whether the claimant reported to him a sudden pain occurring on that day. You appear to find the Claims Adjudicator's question to Dr. [K] on this point somewhat sinister, but it seems to the Commissioners to have been proper. It arose directly from the new information the claimant had just given him.

continued...../2

RE: Perry SWISTAK
Claim No. XC80007097

22 June 1984

Dr. [K] advised the Claims Adjudicator that he could not recall and had no record of a sudden onset of pain occurring on January 24 being reported to him. This reasonably increased the Claims Adjudicator's doubt regarding the claimant's evidence. You seem to feel that the Claims Adjudicator was in some way negligent in not considering the fact that Dr. [K] may have made a recording error. However, in the Commissioners' opinion, you have provided no real grounds for the existence of such an error. You refer to other inconsistencies or errors made by Dr. [K] in filling out the report forms, notably his answers to questions 7 and 8 on his January 25, 1980, report, his answer to question 9 and the bottom of the February 5, 1980, form, and his giving the wrong date of first treatment on the latter form. The Commissioners have examined these forms, but do not feel the errors or inconsistencies to which you refer are significant. They feel that your argument is speculative in nature. Dr. [K] was specifically asked by the Claims Adjudicator whether an occurrence on January 24, 1980, was reported to him and he said, "No". There is no reason to question either that statement or his report of January 10, 1980, as the injury date. Even now, the claimant does not deny that the initial groin pain was felt on that date and that he gave this to Dr. [K] as the date when his problems commenced.

There is another point in favour of the Board's decision which you do not discuss. The Commissioners refer you to the employer's letter of February 8, 1980. When the claimant first reported the injury to his employer on January 25, 1980, on being asked by the employer if he related his hernia to anything particular, he could think of nothing. The employer then obtained confirmation that no work injury occurred from the claimant's doctors. It was not until February 5, 1980, that Mr. Swistak reported a work injury to his employer.

The report of Dr. [O] of November 10, 1981, is, of course, in favour of the claimant's position. The Commissioners do not feel that his report outweighs the evidence to the contrary. Nor do they consider that Section 99 applies.

continued...../3

RE: Perry Swistak
Claim No. XC80077097

22 June 1984

In conclusion, the Commissioners have concluded that the previous decision denying this claim was a reasonable one and you have provided no grounds for any change.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Province of British Columbia

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Telephone: (604) 736-8711

000028

File: 82-6853

September 6, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Complaint of Mr. Perry Swistak against the Workers' Compensation Board, Claim No. XC80007097

I am responding to Mr. Attewell's June 22, 1984 notification of the Commissioners decision not to reconsider Mr. Swistak's hernia claim. The Commissioners give two reasons for this decision, the major one being that one of his physicians indicated on application forms that a fifteen day reporting delay occurred between the injury and its diagnosis. The second reason given by the Commissioners is that there was no specific work incident reported as causing the hernia. I will discuss these two issues separately.

1. Did a reporting delay occur?

The possibility of a reporting delay is indicated on forms filled out by Dr. [K] but is contradicted by the medical reports of Mr. Swistak's two other physicians. On January 23, two days before Dr. [K]'s first report, Dr. [N] saw his patient and described discomfort and a general weakness in Mr. Swistak's groin area but no hernia. On February 1 (before there was any controversy over dates or reporting delays), when summarizing the history of Mr. Swistak's hernia, Dr. Osler described discomfort as starting on January 10, but no hernia appearing until January 24.

In deciding that the hernia must have occurred on January 10, but treatment not sought until January 25, the Commissioners are ignoring those two doctor's reports and are relying instead upon the compensation forms that Dr. [K] filled out on January 25 (and re-read six weeks later to the adjudicator over the phone). Dr. [K] was not able to reconstruct any conversation between himself and his patient at that time, but his forms described a work related hernia as occurring on January 10, instead of discomfort starting on that date as reported by the other two

physicians. As mentioned in my previous letter, Dr. [K] was apparently easily confused by compensation forms, as he demonstrated several inaccuracies and inconsistencies in filling them out.

It is worth mentioning that MacMillan Bloedel dropped their objections to Mr. Swistak's claim when they realized that Dr. [N] had seen Mr. Swistak on January 23 and had found no hernia. As Dr. [K] had not even examined Mr. Swistak until January 25, it would be irrational and unreasonable to rely on his opinion rather than that of Dr. [N] on the question of whether or not a hernia could have pre-existed the January 25 examination by fifteen days. The Board's conclusion that there was a reporting delay is therefore based on an incorrect weighing of the evidence and is unjust.

2. Must a hernia immediately follow a single precipitating incident?

Causation is a medical issue. Dr. [O], Mr. Swistak's specialist and surgeon, addresses this question in his November 10, 1981 letter in support of a hearing before a Medical Review Panel:

> While one cannot be categoric (sic) about the time of injury and the appearance of a lump there is no question in my mind that there may be a significant period of time elapse, (sic) particularly from when the discomfort is first noted and a lump actually appears.

At that time, Mr. Goseltine could not see any disputed medical issue, and refused Mr. Swistak's request for a Medical Review Panel on that ground. If the Commissioners should now decide that causation is indeed an issue, Mr. Swistak's original request for a Medical Review Panel should be honoured.

In summary, my recommendations pursuant to Section 22 of the Ombudsman Act are:

1. That the Commissioners accept the findings of Dr. [N] that Mr. Swistak had no hernia on January 23.

2. If the question of causation should still need to be resolved, that the Commissioners call for a Medical Review Panel to make a finding on that issue.

Yours sincerely,

Karl A. Friedmann

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

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14 November 1984

NOV 16 1984

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: Perry SWISTAK
Claim No. XC80007097

Your letter of September 6, 1984, has been considered by the Commissioners.

Your argument seems to be that, since Dr. [N] found no hernia on January 23, 1980, and a hernia was suspected by Dr. [K] when he saw Mr. Swistak on January 25, 1980, then the hernia must have occurred on January 24, 1980, while he was at work. The Commissioners consider, however, that there are several difficulties with this argument. These are as follows:

1. Mr. Swistak's first report of an onset of pain was on January 10, 1980, at work. Dr. [N] did note a groin weakness on January 23, 1980. Even if the hernia was not diagnosed until January 25, 1980, it may have existed previously.

2. Neither on January 10 or 24 is it alleged that any specific incident occurred. Mr. Swistak was simply doing his normal work.

3. Mr. Swistak failed to report any problems to his employer until January 25, 1980, and then indicated that there was nothing at work which had brought it on.

continued...../2

RE: Perry SWISTAK
Claim No. XC80007097

14 November 1984

It seems to the Commissioners that, on the basis of these factors, and notwithstanding that there may be contrary arguments, the Board quite properly concluded that there was insufficient evidence to relate Mr. Swistak's hernia to his work.

The Commissioners note your proposal that the matter be referred to a Medical Review Panel. However, on reviewing Mr. Goseltine's letter of November 17, 1981, and the board of review decision of August 27, 1982, the Commissioners consider that the decision to reject Mr. Swistak's appeal to a Medical Review Panel was reasonable. They see no grounds for interfering with that decision.

In the result, the Commissioners have decided to reject your recommendations on this claim. The claim will remain disallowed.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

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WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

RECEIVED
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2 January 1985

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: Perry SWISTAK
Claim No. XC80007097

Following my letter of November 14, 1984, and the discussion of this claim at the meeting between Mr. Bucher and members of your staff on November 15, 1984, this claim has again been reviewed by the Commissioners.

The Commissioners remain of the view that the reasoning and conclusion set out in my previous letter is correct and see no reason to change that decision. They have decided that this claim should remain disallowed.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

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202, 1275 West Sixth Avenue
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000033

File: 82-8144

February 9, 1984.

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Complaint of Mr. Craig McCargar, Claim Nos. XC79026834 and XC80052233

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl. (1)

PRELIMINARY REPORT

pursuant to Section 16 of the Ombudsman Act

Opportunity to make representations

16. Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter.

– Ombudsman Act, R.S.B.C. 1979, c. 306

Complainant: Mr. Craig McCargar

Authority: Workers' Compensation Board

Background:

On May 4, 1979 Mr. McCargar's employer reported to the Board that Mr. McCargar had been involved in an accident on April 17, 1979. In describing the nature of the accident, the employer stated that Mr. McCargar was moving a 300 pound crate with a dolly when the load fell forward knocking him down and the crate landed on his hand. The employer included the left hand, elbow, shoulder and back as injuries which Mr. McCargar had reported to the employer. Mr. McCargar attended Vancouver General Hospital Emergency Department where the final diagnosis was that he had bruised his left hand. There was no mention of any back, shoulder or elbow problems. The claim was accepted by the Board for the left hand.

On March 28, 1980 Mr. McCargar suffered a further accident when he slipped on oil and fell down in a sitting position. The employer reported that Mr. McCargar's back had been bothering him a while even since his 1979 accident. The reports by the employer and Mr. McCargar were not made until the end of July 1980. On July 18, 1980 Mr. McCargar's physician, Dr. [redacted], reported to the Board that he had first seen Mr. McCargar on February 21, 1980 with a complaint of recurring low back distress and recent left leg pain. He reported that Mr. McCargar had complained of recurring low back ache on the left side for the past 10 to 11 months which was worse when sitting or driving a car. He had never been seen in the past by any doctor for back ache. He next

saw Mr. McCargar on July 9, 1980. He reported that Mr. McCargar had taken a few days off in February and was fine for two months, and then for the last month or so he had noticed recurring aching in the low back. Dr. [redacted] reported that by the 16th of July Mr. McCargar was much worse despite the normal x-rays and felt that the symptoms suggested perhaps an L4-L5 radiculitis.

Mr. McCargar was admitted to hospital on August 18, 1980. The hospital Consultation Report of August 21, 1980 stated that Mr. McCargar was well until he suffered a serious fall at work a year ago and from that time until the present he had continuing low back pain. A myelogram revealed a significant abnormality consistent with a disc protusion at the L5-S1 level with some migration of the material to the L4-5 level. On September 9, 1980 Mr. McCargar underwent a bilateral partial laminectomy with a disc excision at L5-S1.

On October 23, 1980 the adjudicator disallowed Mr. McCargar's 1980 claim. The basis for her decision was that he did not seek any medical treatment between April 1979 and February 21, 1980 nor did the Board have any reports of complaints from him during this period. The adjudicator therefore did not consider that his back complaints could be related to either his injury of March 28, 1980 or his injury of April 17, 1979.

Mr. McCargar appealed this decision to the boards of review on the basis that he had had three accidents at his place of employment and never had any back problems before his first accident. The boards of review allowed Mr. McCargar's appeal in a majority decision dated July 7, 1981. Their basis for allowing Mr. McCargar's appeal was a report from Dr. [A] , the surgeon who performed Mr. McCargar's laminectomy. The boards of review stated that:

> Although Dr. [A] says that Mr. McCargar's condition could have existed for years or months prior to becoming symptomatic, he also says that there is always an initial insult to produce the main disruption of the anulus of the disc. Given that Mr. McCargar denies any previous injuries to his back and given his youthful age (21) it seems to us that on the evidence before us it is unreasonable to look beyond the injuries reported by Mr. McCargar to explain the symptoms and subsequent disc surgery.

Although the boards of review noted the medical opinions expressed by the three Board doctors, they stated that at the very least there did appear to be doubt upon the issue and the disputed possibilities were evenly balanced. Therefore, they decided to resolve the issue in accordance with the possibility most

favourable to the worker and allowed the appeal. There was a dissenting opinion from one member of the boards of review on the basis that he could not conclude from Dr. [A] 's letter that the April 17, 1979 injury was necessarily the initial insult and therefore, in his opinion, to allow the appeal would be pure speculation.

The adjudicator referred the boards of review decision to the Commissioners under Section 90(3) of the Act. On July 30, 1981 the Commissioners wrote to Mr. McCargar with their provisional decision. They provisionally decided not to implement the board of review decision on the grounds that it was against the overwhelming weight of the evidence. They stated that:

> The board of review concluded that your back problems were initiated by the 1979 injury. However, it appears to the Commissioners that this is clearly contrary to the available evidence. Dr. [A] 's report might provide a reasonable basis for such a decision if the 1979 injury was, in fact, an injury to the back. However, the evidence overwhelmingly indicates that it was basically only a left hand injury and did not affect the back...Dr. [A] himself does not relate your complaints to that injury, but merely states that an injury must have occurred at some time in the past, possibly years earlier. The Board is not required to accept responsibility for a condition simply because there is no record of any injury having occurred other than the work injury in question.

The Commissioners confirmed their provisional decision on September 16, 1981.

Last Decision Level:

As noted, the last decision was that of the Commissioners dated September 16, 1981.

Employer Notification:

I have not notified the employer as the employer did not object to Mr. McCargar's appeal at the boards of review level.

Issue:

The issue investigated in this complaint was:

> Was the decision of the Commissioners not to implement the board of review decision an unjust decision?

Grounds for Adverse Findings:

In my opinion the complaint may be substantiated for the following reasons:

1. The Commissioners stated in their decision of July 30, 1981:

> Although your employer's report relating to the March 28, 1980 incident refers to your back having bothered you since your first accident, other information has been received from your employer that, prior to that incident, there is no record of any back complaints in the First Aid Book. You clearly did not seek medical attention between April 1979 and February 1980.

It does not seem unreasonable that Mr. McCargar would not record his back complaints in the First Aid Book when one considers the evidence that his complaints were of intermittent stiffness during this period of time. The fact that his employer was aware of his problems is evidence that his problems existed.

2. Although Mr. McCargar did not seek medical attention between April 1979 and February 1980, this also is not unreasonable in view of the nature of the complaints that he had during this time. He was experiencing intermittent stiffness in his back, which was particularly noticeable when he was driving or getting out of cars. Although a visit to his doctor may have provided the best evidence that he was having problems with his back, evidence from Mr. McCargar and from his employer cannot be discounted merely because Mr. McCargar did not seek medical attention in this time. It obviously was not a problem which disabled Mr. McCargar from working as he continued to work for most of the time in question, and this would provide another reason why Mr. McCargar did not seek medical attention between April 1979 and February 1980.

3. The Commissioners stated:

> The board of review concluded that your back problems were initiated by the 1979 injury. However, it appears to the Commissioners that this is clearly contrary to the available evidence. Dr. [A] 's report might provide a reasonable basis for such a decision if the 1979 injury was, in fact, an injury to the back. However, the evidence overwhelmingly indicates that it was basically only a left hand injury and did not affect the back. This is evident from the lack of reference to a back injury in the reports received at the time and to the lack of evidence of back complaints experienced between that time and February 1980, and again between February 1980 and March 28, 1980.

4. Dr. [A] 's report dated May 28, 1981 states:

> ...the findings at surgery would be consistent with a back injury at any time prior to the surgery. What might have happened was that with this injury in April of 1979 the anulus of the disc was damaged and weakened. At some time later the anulus of the disc would break or rupture allowing a piece of disc material to push through. With further activities and time, this piece of disc can be squirted out through this opening and slowly move up the spinal canal, often staying outside of the spinal canal underneath the anterior longitudinal ligament. Therefore, various injuries as well as certain movements and stress to the spine, can produce a changing picture but there is always an initial insult to produce the main disruption of the anulus and tearing with subsequent weakness of the various supporting ligaments...Mr. McCargar's condition could have existed for years or months prior to becoming symptomatic, again depending upon the degree of weakness or injury from the initial insult and from the various changes that occurred resulting from subsequent stress and injuries.

5. According to Dr. [A] , Mr. McCargar's condition could have existed for years or months prior to becoming symptomatic depending upon the degree of weakness or injury from the initial insult and from the various changes that occurred resulting from subsequent stress and injuries. Dr. [A] 's reply on this issue was in response to the question by the boards of review why Mr. McCargar would not experience any symptoms between April 1979 and February 1980 and then not again until July 9, 1980. It seems inconsistent that Dr. [A] 's evidence explaining why it was possible that Mr. McCargar could have had no symptoms in this period of time after suffering an initial insult to his back is then used by the Commissioners to conclude that the 1979 injury did not affect his back because there was no evidence of back complaints in this period of time. Therefore, it cannot be categorically stated that the 1979 injury did not affect Mr. McCargar's back because there is a lack of evidence of back complaints experienced between April 1979 and February 1980 and again between February 1980 and March 28, 1980.

6. Although the only reference to Mr. McCargar's back injury was the employer's report, this is not surprising in view of the very limited information on file in his 1979 claim. The 1979 claim consists only of the employer's report, a physician's report and account, the hospital admission report and an x-ray report of Mr. McCargar's left hand. Although the hospital admission report and Dr. [redacted]' account refer only to

Mr. McCargar's left hand (Dr. [redacted] is the same doctor as listed on the hospital report), this is not surprising when one considers that a crate fell on his hand and so would be his obvious complaint at that time. However, the employer stated that Mr. McCargar had also reported an injury to his back. It is not unreasonable to conclude that Mr. McCargar could have suffered an injury to his back when one considers that a 300 pound crate fell forward knocking him down, that he reported to the employer that he had suffered a back injury and his employer reported this information to the Board.

7. The Commissioners further state:

> Dr. [A] himself does not relate your complaints to that injury, but merely states that an injury must have occurred at some time in the past, possibly years earlier. The Board is not required to accept responsibility for a condition simply because there is no record of any injury having occurred other than the work injury in question. There is no presumption that a condition is to be accepted as related to a work injury unless the Board can prove that it is due to some other cause.

8. No. 82.32 of the Claims Adjudication Manual states:

> A statement of a claimant about his own condition is evidence insofar as it relates to matters that would be within his knowledge, and it should not be rejected simply by reference to an assumption that it must be biased. Also there is no requirement that the statement of a claimant about his own condition must be corroborated...A conclusion against the statement of the claimant about his own condition may be reached if the conclusion rests on a substantial foundation, such as clinical findings, other medical or non-medical evidence or serious weakness demonstrated by questioning the claimant, or if the statement of the claimant relates to a matter that could not possibly be within his knowledge. (my emphasis)

9. Mr. McCargar stated on numerous occasions that he never had any back pain or injuries prior to the incident of April 17, 1979, that he never sought any medical attention for his back prior to this incident and that he does not play rough sports. There has been no evidence produced by the Board that this is not the case. Therefore, it would appear, in applying the above policy to this case, that the Board should be accepting Mr. McCargar's statement about the condition of his back prior to April 17, 1979.

10. The Commissioners stated in their letter of July 30, 1981:

> There is no presumption that a condition is to be accepted as related to a work injury unless the Board can prove that it is due to some other cause. Rather, a claim must be determined by whether there is evidence which shows positively that the work injury did cause the complaints. All the doctors who have given opinions on the specific question whether the 1979 injury caused your complaints have concluded that it did not.

11. This last statement is not entirely correct. Dr. [A] was asked by the boards of review whether his findings after performing surgery on Mr. McCargar were consistent with a back injury that could have occurred in April 1979. Dr. [A] replied that the findings at surgery would be consistent with a back injury at any time prior to the surgery. Since Mr. McCargar's evidence is that he did not have any prior back injury other than the ones reported to the Board, then it would appear that the only back injury that Dr. [A] could be referring to was the April 17, 1979 injury.

Based on the above findings, I may conclude that the Board's decision to disallow Mr. McCargar's 1980 claim was unjust because it failed to give proper weight to the statements of Mr. McCargar and the evidence of Dr. [A] and it was based on incorrect inferences.

Possible Recommendation:

I have not yet reached a final conclusion on this complaint, and I would appreciate your comments on the grounds set out above. I am considering the following recommendation:

That the Board accept Mr. McCargar's 1980 claim.

Karl A. Friedmann
Ombudsman
February 9, 1984.

WORKERS' COMPENSATION BOARD
6951 Westminster Highway
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

19 April 1984

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VANCOUVER

Dr. Karl A. Friedmann
Ombudsman
Legislative Assembly of
British Columbia
#202 - 1275 West 6th Ave.
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

Re: Craig McCARGAR
Claim Nos. XC79026834 & XC80052233

Your letter dated February 9, 1984, has been considered by a panel of two Commissioners.

You propose that Mr. McCargar's 1980 claim be allowed, but since most of your argument is directed at relating his complaints to his 1979 injury you presumably are also proposing that that claim be re-opened.

The injury occurring on April 17, 1979, caused only one days loss of time from work. Though the employer's report mentions the back as being injured, no other document submitted at the time does so. In particular, there is no reference to the back being injured in the report of Mr. McCargar's visit to the hospital. It seems to the Commissioners that, if a significant back injury had then been suffered, it would have been mentioned when treatment was first sought or soon afterwards.

The Commissioners do not dispute Mr. McCargar's evidence that he had no problems prior to his 1979 incident. Nor was the Commissioners' previous decision based on any different finding. The Commissioners, however, do not feel that this necessarily means that all his complaints must

.../2

be related to that injury, particularly when it is highly questionable whether it was an injury to the back. They would also point out that Mr. McCargar's testimony is contradictory as to whether he suffered back complaints after the 1979 incident. In this connection, I draw your attention to the third paragraph of the first page of my letter of July 30, 1981.

You are certainly correct that Dr. [A] 's opinion is to the effect that his findings are consistent with an injury occurring in April, 1979. However, it does not appear to the Commissioners that his opinion is of great assistance to Mr. McCargar since the doctor also states that "the findings of surgery would be consistent with a back injury at any time prior to the surgery". This must be contrasted with the specific opinion of Dr. [K] expressed in her memo of October 15, 1980, that there was no relationship between Mr. McCargar's complaints and the 1979 injury. Drs. [redacted] and [redacted] concurred with her opinion.

It seems to the Commissioners that, having regard to all of the evidence, that the most reasonable conclusion is that Mr. McCargar did not suffer a significant back injury in April, 1979, and had no significant back problems until February, 1980, when he first sought treatment for them. What caused his problems at that time cannot be known, but there appears to be no real basis for relating them to his 1979 injury. The medical evidence is, notwithstanding Dr. [A] 's report against such a conclusion.

With regard to the 1980 claim, you provide no real argument for relating Mr. McCargar's problems to a new injury occurring on March 28, 1980. Nor do the Commissioners feel that there is any basis for accepting that any incident on that date was significant when Mr. McCargar was clearly having problems in the previous month and the incident in question caused no immediate disablement or need for further treatment. The opinions of Drs. [B] , [redacted] and [redacted] are that the incident on March 28, 1980, was not significant.

In the result, the Commissioners have decided to reject your proposals. There will be no change in the Board decisions respecting the 1979 and 1980 claims.

Yours truly,

N.C. ATTEWELL
Secretary to the Board

Legislative Assembly
Province of British Columbia

OMBUDSMAN

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File: 82-8144

July 17, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Craig McCargar; Claim Nos. XC79026834 & XC80052233

I have received Mr. Attewell's letter dated April 19, 1984 regarding Mr. McCargar. I have considered the Commissioners' comments contained in his response to me.

You have objected to my tentative recommendation on the following grounds:

1. The Commissioners feel that if a significant back injury had been suffered by Mr. McCargar on April 17, 1979 it would have been mentioned when treatment was first sought or soon afterwards. The employer's report is the only document which mentions Mr. McCargar's back as being injured at that time.

   I do not agree that Mr. McCargar needed to have suffered a significant back injury on April 17, 1979 in order to damage and weaken the anulus of the disc as reported by Dr. [A]. In fact, Dr. [A] allows for the possibility that Mr. McCargar's back injury may not have been a significant one when he states, "Mr. McCargar's condition could have existed for years or months prior to becoming symptomatic, again depending on the degree of weakness or injury from the initial insult and from the various changes that occurred resulting from subsequent stress and injuries." (my emphasis)

   Although the hospital report does not mention Mr. McCargar's back injury, Mr. McCargar did mention that he injured his back to the employer, who reported it to the Board. Therefore, Mr. McCargar did mention his back injury when treatment was first sought.

2. The Commissioners point out that Mr. McCargar's testimony is contradictory as to whether he suffered back complaints after the 1979 incident. This contradictory testimony consists of a memo dated August 1, 1980 by the Claims Adjudicator that Mr. McCargar indicated his back had been sore on and off since the injury but he had continued to work. His physician reported in February, 1980 that he had been complaining of recurring back ache for 10 to 11 months. However, when Mr. McCargar spoke to the Claims Administrator on August 21, 1980 the Administrator recorded that Mr. McCargar had told him that he had recovered from his 1979 injury and had had no further pain. Further, he told the board of review that he had no back or leg pain until several months after the injury.

Although this seems to be an apparent contradiction on Mr. McCargar's part, one must consider the statements made by both Mr. McCargar's employer and Mr. McCargar at the time of applying for compensation in 1980. The employer reported that Mr. McCargar's back had been "bothering him awhile even since his first accident." Mr. McCargar has also supplied statements by his parents and fellow employees regarding their recollection of his back problems between April 17, 1979 and March 28, 1980, and how these problems affected his work performance and abilities, and the fact that he had no problems or limitations with his work performance prior to his first work injury. Copies of these statements are attached. These statements are all consistent with Mr. McCargar's statements that after the 1979 injury he suffered back discomfort and stiffness and that gradually his symptoms worsened to the extent that he suffered back and leg pain.

Further, there does not appear to be a contradiction between Mr. McCargar's statement that his back had been sore on and off since the injury and his statement to the board of review that he experienced no back or leg pain until several months after the injury. It would appear that Mr. McCargar was making a distinction between stiffness and discomfort which he felt at first, versus pain which he felt later. The fact that his condition deteriorated is supported by the statements of his parents and Mr. [redacted]. Although Dr. [redacted], in his report of February, 1982, does not make this distinction but rather refers to Mr. McCargar's "recurring backache for the past 10 to 11 months", this distinction between pain and soreness should not play a crucial role in determining whether Mr. McCargar was having symptoms relating to his back after his 1979 injury. This is especially so in view of Dr. [A] 's later explanation that Mr. McCargar's condition could have existed for years or months prior to becoming symptomatic after an initial insult.

The only discrepancy seems to be the Administrator's memo of August 21, 1980 where he recorded that Mr. McCargar had told him that he had recovered from his 1979 injury and had had no further pain. This statement stands out in isolation against all the other evidence on file to the contrary. Mr. McCargar does not remember making this statement. Mr. McCargar also informed my investigator that, unlike his earlier phone call to the Board made on August 1, 1980 when he stated that his back had been sore on and off since the injury, his phone call to the Board on August 21, 1980 was made from the hospital. (He was admitted to the hospital on August 15, 1980 where he was treated conservatively until his surgery on September 9, 1980 and was discharged on September 15, 1980). He further states that in the hospital, prior to surgery, he was given pain killers. This fact may account for the resulting statement attributed to Mr. McCargar, which he does not recall making and which is the only inconsistent statement on file regarding his problems after the 1979 injury. Further, the board of review assessed Mr. McCargar's credibility in allowing his appeal and the Commissioners do not dispute his credibility in that they accept his evidence that he had no problems prior to his 1979 accident. The preponderance of the evidence points to the conclusion that Mr. McCargar did experience problems between his two work injuries. Therefore, it is my belief that this one inconsistency should not be held against Mr. McCargar.

3. The Commissioners state that they do not dispute Mr. McCargar's evidence that he had no problems prior to his 1979 accident. In fact, Mr. McCargar denied any previous injuries to his back at his hearing before the boards of review. Despite this recognition, the Commissioners do not feel that Dr. [A] 's opinion that his findings are consistent with an injury occurring in April 1979 is of great assistance since Dr. [A] also states that "the findings of surgery would be consistent with a back injury at any time prior to the surgery".

   If the Commissioners accept that Mr. McCargar had no problems prior to his 1979 incident, and if one considers Dr. [A] 's opinion that the findings of surgery would be consistent with a back injury at any time prior to the surgery, then the logical conclusion is that the only back injury Dr. [A] could be referring to would be either the back injury of 1979 or the back injury of 1980, both of which occurred at work.

4. The Commissioners state in their letter of July 30, 1981 to Mr. McCargar that:

"the board of review concluded that your back problems were initiated by the 1979 injury. However, it appears to the Commissioners that this is clearly contrary to the available evidence. Dr.[A]'s report might provide a reasonable basis for such a decision if the 1979 injury was, in fact, an injury to the back. However, the evidence overwhelmingly indicates that it was basically only a left hand injury and did not affect the back. This is evident from the lack of references to a back injury in the reports received at the time and to the lack of evidence of back complaints experienced between that time and February 1980 and again between February 1980 and March 28, 1980."

I had noted in my letter of February 9, 1984 that it seemed inconsistent that although Dr.[A] explained why it was possible that Mr. McCargar could have had no symptoms in the period of time mentioned by the Commissioners after suffering an initial insult to his back, the Commissioners concluded that the 1979 injury did not affect his back because there was no evidence of back complaints in this period of time. The Commissioners' conclusion that the 1979 injury did not affect his back led to their decision that Dr.[A]'s report did not provide a reasonable basis for the board of review decision. This appears to be a circular argument. Notwithstanding this inconsistency, there is indeed evidence that Mr. McCargar complained of back problems between his initial injury and his second injury of March 28, 1980. This evidence consists of the employer's report to the Board dated July 23, 1980, Mr. McCargar's own evidence, and the attached statements.

5. The Commissoners further state that Dr.[A]'s opinion must be contrasted with the specific opinion of Dr.[B] that there was no relationship between Mr. McCargar's complaints and the 1979 injury. They further state that Drs. [redacted] and [redacted] concurred with her opinion.

Although it is true that the Board doctors were of the opinion that Mr. McCargar's complaints were not related to his 1979 or 1980 injuries, it is significant that these doctors did not examine Mr. McCargar but based their opinions on a review of his file. In contrast, Dr.[A] was the orthopaedic surgeon who performed the surgery on Mr. McCargar.

In her memo, Dr.[B] states that, based on the information in Mr. McCargar's file, there is no adequate evidence to support a relationship between his injuries and his symptoms requiring hospitalization, nor was there any apparent relationship between the 1979 incident and his problem in February 1980 and July 1980. At the time that Dr.[B] gave

her opinion, she did not have the advantage of considering Dr. [A] 's report. Dr. [A] 's report provided evidence that was not available at the time that Dr. [F] gave her opinion that adequate evidence did not exist to support such a relationship.

Further, Dr. [redacted]'s conclusion (concurred in by Dr. [redacted]) that there was no indication of any relationship between the incidents and the surgery was partly based on Mr. McCargar's statement to the Claims Administrator that he had recovered from the 1979 injury without any further pain (memo 5.) She neglected to refer to memo 1 where Mr. McCargar is quoted as stating that his back had been sore off and on since the 1979 injury. Therefore, her opinion does not appear to be based on the totality of the evidence. As stated earlier, the preponderance of the evidence indicates that Mr. McCargar did experience problems between his two work injuries. Thus, the medical opinions to be balanced are those of Dr. [F] , who based her opinion on a file review, and that of Dr. [A] , the specialist who performed the surgery. Although Dr. [A] was not specific regarding the fact that Mr. McCargar's 1979 or 1980 work injuries resulted in his surgery, the fact that he stated that an initial insult was responsible and the boards of review and Commissioners have accepted Mr. McCargar's evidence that he had no previous back injuries, the only possible injuries possible as being responsible would be work injuries.

6. The Commissioners state that I provide no real argument for relating Mr. McCargar's problems to a new injury occurring on March 28, 1980. They further state that there is no basis for accepting that any incident on that date was significant when Mr. McCargar was clearly having problems in the previous month and the incident in question caused no immediate disablement or need for further treatment.

The boards of review decided to allow Mr. McCargar's appeal on the basis of a new incident in March 1980 which aggravated an injury sustained in 1979. I agree with their reasoning and conclusion. The fact that the 1980 incident caused no immediate disablement or need for further treatment is explained in Dr. [A] 's report in which he states that Mr. McCargar's condition could have been asymptomatic for years or months depending upon the degree of weakness or injury from the initial insult or from the various changes that occurred resulting from subsequent stress and injuries. No other injuries intervened as a possible cause for Mr. McCargar's gradual disablement and ultimate surgery.

Based on the above, I have concluded that the Board's decision to disallow Mr. McCargar's 1980 claim as a new incident (which aggravated his pre-existing condition resulting from his 1979 accident) was unjust. Pursuant to S.22 of the Ombudsman Act, I recommend that the Board accept Mr. McCargar's 1980 claim.

I would appreciate your response to my recommendation at your earliest convenience.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl.

[redacted]

TO WHOM IT MAY CONCERN:

I WAS EMPLOYED BY [redacted] FROM 1971 TO 1980. DURING THE LAST SIX YEARS I WAS THE BODY SHOP MANAGER. CRAIG MCCARGAR HAD BEEN WORKING FOR [redacted] FOR ABOUT ONE YEAR WHEN HE WAS INJURED. MR MCCARGAR WAS A CONSCIENTIOUS EMPLOYEE. HE AT ALL TIMES WAS POLITE, HE PERFORMED HIS DUTIES WELL, HIS ATTENDENCE REGULAR. I DID NOT WITNESS THE ACCIDENT HOWEVER I CAN RELATE A FEW DETALS REGARDING MR MCCARGARS BEHAVIOR AFTER THE ACCIDENT. DURING THE COURSE OF A BUSINESS DAY OFTEN AS MANY AS 60 TO 80 CARS WOULD HAVE TO BE MOVED, OCCASIONALLY PARTS HAD TO PICKED UP, AND AT THE END OF THE DAY THE SHOP SWEPT CLEAN OVER A PERIOD OF TIME I NOTICED MR MCCARGARS ABILITY TO PERFORM HIS DUTIES DECREASE, HE COMPLAINED OF A STIFFBACK, STATING THAT HE HURT TO PICK UP HEAVY OBJECTS AND WHEN HE GOT IN AND OUT OF CARS, I ALSO NOTICED THAT HIS ATTENDENCE BECAME LESS REGULAR. I QUESTIONED MR MCCARGAR ABOUT WHEATHER HE WANTED TO STAY IN HIS JOB. AS I FOUND THE WORKLOAD FOR MY SELF BECAME UP, HE STATED HE ENJOYED WORKING FOR [redacted] BUT THE WORK AT PRESENT WAS TOO PHYSICAL. AT THE TIME I HAD AN OPENING ON THE SERVICE COUNTER ANSWERING PHONES AND WRITING WORK ORDERS SO I GAVE MR MCCARGAR AN OPPORTUNITY TO MOVE UP. WHILE WORKING THE COUNTER I DO REMEMBER THE OCCATIONAL COMPLAINT ABOUT HIS HEALTH, AND I REMEMBER THAT HE ON OCCASION WOULD WALK WITH A LIMP. I LEFT [redacted] IN THE SPRING OF 1980. I HAVE SEEN MR MCCARGAR ON OCCATION SINCE, NOT FOR ABOUT TWO YEARS NOW, BUT I HAVE SEEN HIS FATHER AND DO UNDERSTAND THAT HIS BACK HAS BECOME WORSE

YOURS SINCERELY

[redacted]

June 16/84

To Whom It May Concern

Dating back to Craig's accident at [redacted] in 1979, We noticed he was having problems with his back. He began complaining of morning stiffness and his bending ability began to worsen as time went on.

Shortly after the accident, his walking became impaired. He was walking with a limp in his left leg, which gradually got worse.

Near the end of 1979, our son's back began to bother him more, at which time, his father put a board in his bed to try and help his back.

Our son never really complained of pain, just gradual discomfort, which worsened as time went on and began turning to left leg pains. He also had problems driving his car, difficulty sitting, getting in and out. A pillow to support his back helped very little.

After his second incident at [redacted], his back became rapidly worse, until finally, Craig was hospitalized.

(father) D. McGregor

(mother) C. McGregor

June 1st, 1984

To Whom It May Concern:

I have known Craig McCarger since he started working for [redacted]. in 1978 and had not noticed any problems or limitations of work duties with Craig until a work related accident involving Craig in the spring of 1979.

Shortly after the accident, Craig started walking with a noticeable limp. Also he started complaining about back problems. He sat with considerable discomfort and at times was forced to miss work because his back was so sore which prevented him from driving cars which was one of his job requirements.

Craig was also restricted from lifting heavy items such as bumpers, fenders, etc. because of his back problems.

Yours truly,

[redacted]

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VANCOUVER

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

12 February 1985

Dr. Karl A. Friedmann, Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: Craig McCARGAR
Claim No. XC79026834 & XC80052233

Your letter of July 17, 1984, has been considered by the Commissioners.

The Commissioners accept that there are evidence and arguments in favour of the claimant's position, notably Dr. [A] 's report and the evidence suggesting continuity of symptoms from the 1979 incident onwards. However, none of your arguments can avoid the fact that all but one of the reports received at the time of the 1979 injury describe a left hand injury alone, that there was no medical confirmation of back problems until February 1980, and that the three Board Medical Advisers gave opinions contrary to the claimant's position. There is also, notwithstanding your explanations in point 2 of your letter, a conflict in Mr. McCargar's evidence regarding whether he did, in fact, have a continuity of symptoms. The Commissioners do not believe it can be reasonably contended that the Board had no reasonable basis for its decision.

You rely strongly on Dr. [A] 's report. It seems to the Commissioners, however, that the essence of that report is that the claimant's back condition could have originated at any time in the past with an injury of which he was unaware and without any symptoms developing for some time. This report would not seem to assist Mr. McCargar materially because it means that, without realizing it, he could at any time have suffered a work or non-work injury prior or subsequent to the 1979 incident which did not immediately produce symptoms but was the cause of his subsequent condition. It is, therefore, speculative to fix upon the April 1979 incident as the significant one. This is particularly the case when the evidence overwhelmingly indicates that it was a left hand injury only.

continued...../2

RE: Craig McCargar
Claim Nos. XC79026834
and XC80052233

12 February 1985

With regard to the March 1980 incident, the evidence indicates that Mr. McCargar was having problems the previous month, and that that incident did not immediately cause him to seek treatment or lose time for work. The Commissioners consider that there is no real basis for accepting the 1980 claim. Their comments regarding Dr. [A] 's report with respect to this claim are the same as with respect to the 1979 claim.

In conclusion, the Commissioners see no reason why they should overturn the prior Board decision on the claim and accept your recommendation.

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

OMBUDSMAN

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Telephone (604) 736-6721

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File: 83-50155

March 14, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Complaint of Terrence Forrest, Claim No. C70058177

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl. (1)

PRELIMINARY REPORT

pursuant to Section 16 of the Ombudsman Act

Opportunity to make representations

16. Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter.

- Ombudsman Act, R.S.B.C. 1979, c. 306

Complainant: Mr. Terrence Forrest

Authority: Workers' Compensation Board

Background:

Mr. Forrest injured the right side of his lower back and right hip on August 17, 1970, when he tried to push a load of 12 panels of plywood, which had become jammed. In bracing his feet to push the load, he wrenched his back. For two months after the injury, he was treated by a chiropractor who reported to the Board that he found Mr. Forrest to be suffering from general soreness throughout his back, particularly affecting his lower back and right hip. He was admitted to the Board Rehabilitation Clinic on November 10, 1970 and discharged on December 17, 1970. At the time of his discharge from the Rehabilitation Clinic, it was noted by the examining physician that Mr. Forrest was left with some chronic back ache in the lower lumbar region which did not seem to interfere with the mobility of his spine, and that he would require some assistance in obtaining a suitable job in the plant where he had been employed for nearly five years.

Mr. Forrest attempted to return to work on January 11, 1971, but was only able to work three days. Dr. [A] suggested that Mr. Forrest start working a four hour shift and gradually work up to a full shift. Mr. Forrest worked a four hour shift commencing February 16, 1971 and by March 1, 1971 started an eight hour shift. He continued working an eight hour shift until September 30, 1971, when he ceased working.

On October 1, 1971 Mr. Forrest reported to the Board that he was having further trouble with his back and wished to re-open his claim. The adjudicator denied Mr. Forrest's request to have his claim re-opened as he felt that Mr. Forrest had almost completely recovered from his August 17, 1970 injury. His opinion was based on the fact that Mr. Forrest returned to his full duties on March 1, 1971 and because medical reports on file before he returned to work did not indicate any remaining condition that would have rendered him incapable of carrying out his duties.

Mr. Forrest appealed this decision to the boards of review. They denied his appeal on the basis that this was not his first attack of generalized back pain; and that they could not attribute such generalized problems to the act of pushing against a load of veneer. Since 1972, Mr. Forrest has been in receipt of Handicapped Persons Income Assistance from the Ministry of Human Resources as a result of his spinal problems and deafness in one ear.

Last Decision Level:

The last decision was that of the boards of review dated December 22, 1971. Mr. Forrest's claim has not previously been considered by the Commissioners.

Issue:

Did the Board and the boards of review err in refusing to re-open Mr. Forrest's claim?

Employer Notification:

The employer is [redacted], and is experience rated. Therefore, I have notified the employer of my findings and possible recommendation.

Grounds for Adverse Findings:

1. The adjudicator denied Mr. Forrest's claim because he felt that Mr. Forrest had almost completely recovered from his August 17, 1970 injury as he had returned to his full duties on March 1, 1971, and because medical reports on file before he returned to work did not indicate any remaining condition that would have rendered him incapable of carrying out his duties.

2. The above opinion of the adjudicator does not seem to have been completely shared by Board medical staff. For example:

   a) On October 19, 1970 the Board doctor suggested to Mr. Forrest, after examining him, that he should exercise as directed by P.T. for the rest of his life. This suggestion

does not convey the impression that Mr. Forrest was expected to recover completely from his injury, especially in view of the fact that he suffered no lower back problems prior to his injury.

b) On December 17, 1970 the examining doctor at the Rehabilitation Clinic wrote the following:

> "It would appear that the workman is left with some chronic back ache in the lower lumbar region which does not seem to interfere with mobility of the spine on examination. His condition is evidently becoming chronic and in view of the fact that he is now under the care of Dr. [A] who will be seeing him again on December 28th, it could go on indefinitely...I feel that he will require some assistance in obtaining a suitable job in the plant where he has been employed for nearly 5 years and would like a Rehabilitation Consultant to see him in that regard." (my emphasis)

If the doctor felt that Mr. Forrest would recover completely from the effects of his injuries, it is difficult to understand why he would suggest that Mr. Forrest change the type of work he had been doing prior to the injury.

3. Dr. [A] stated in his report of December 23, 1970 that:

> "He states that at the present time his pain is almost and sometimes completely absent on rising in the morning. Within half an hour of getting up, however, the pain comes on again and continues as the day proceeds. The pain is aggravated on sitting and on walking." (my emphasis)

Dr. [A] concluded that he would expect that Mr. Forrest would improve satisfactorily and that he would eventually return to his job without any surgical procedure being necessary.

4. According to Mr. Forrest's statement, taken on November 5, 1971, after an initial two weeks of light work on a four hour daily basis, Mr. Forrest then turned sheets on the spreader on an eight hour basis. He stated that he walked approximately eight miles a shift on that job. He has told my investigator that much of the walking was in fact running. Therefore, it would appear that the job Mr. Forrest was performing required movements which Dr. [A] noted on December 23, 1980 aggravated Mr. Forrest's pain.

5. Mr. Forrest also informed my investigator that after two weeks of doing "light work" on a four hours daily basis, he was told by the employer's Personnel Manager that he either return to an eight hour shift or return to compensation. Mr. Forrest decided to return to an eight hour shift because he was managing with a four hour shift and because he states that a Board employee told him that if a problem recurred, his claim would be re-opened. He states that in his job as a sheet turner, he was instructed by the foreman to have other employees push any loads. He stated he pushed some small loads, first on a relief basis, and then steadily for the last three months.

A phone call from the employer, recorded in a memo dated February 18, 1971, two days after Mr. Forrest started on four hour shifts, demonstrates that the employer was inconvenienced by the four hour shift. The memo states in part:

> "It was agreed that this man was considered partial disabled and that a four hour day did appear reasonable. Mr. [redacted] indicated he would try to work something out. He indicated that putting him on a four hour day created many problems as this mill works shift work that is, a full eight-hour shift and not just four-hour shifts. He said he would work something out with the claimant and we will be advised."

I infer that the employer preferred that Mr. Forrest return to an eight hour shift or leave work.

6. There remains the question of Mr. Forrest's condition between March 1, 1971 and late August, 1971, and the fact that Mr. Forrest sought no medical attention during this period. The following is relevant:

a) Although Mr. Forrest stated on November 5, 1971 that he did not seek medical attention during this period, in his answer to the adjudicator's letter of October 20, 1971 he stated that he sought medical attention on March 3, 1971 from his chiropractor.

b) My investigator spoke with Dr. [B] , Mr. Forrest's doctor. He has treated Mr. Forrest since October 1969. He stated that Mr. Forrest is not a complaining type of person, but would tend to "put up" with pain until it got intolerable. He states that in fact Mr. Forrest's wife, rather than Mr. Forrest himself, came to see Dr. [B] a few times to say that Mr. Forrest was suffering from pain.

c) Mr. Forrest's reluctance to consult a doctor for anything but completely disabling pain may be partially due to the experience he described in the statement he gave to the Board on November 5, 1971. He stated that he telephoned Dr. [A] just after he returned to work (probably in January, 1971), and had missed a day of work because of his back. His understanding from his union representative was that if his back bothered him, he should let his doctor know. Therefore, he contacted Dr. [A], but was told that his word that he had missed work could not be taken over the telephone. His wife telephoned Dr. [A] some time later to advise that Mr. Forrest's back was hurting him, and Dr. [A] suggested that Mr. Forrest make an appointment. Mr. Forrest did so, and then stated that he was advised by Dr. [A] that he did not have time to bother with "that type of thing" and that he could not have Mr. Forrest coming in everyday in a little pain.

Mr. Forrest stated he never returned to or phoned Dr. [A] after this incident. Mr. Forrest said in his statement that he did not think to see another doctor because there was not much discomfort after that, and because he just "got fed up" and "stuck it out at work".

7. In its decision letter of December 22, 1971 to Mr. Forrest, the boards of review stated:

> "We cannot feel that any serious injury to your back occurred on August 17, 1970, when you felt some pain in the right lumbar area while attempting to push a load of veneer. The claim was accepted and paid on the basis of a strain to the lumbar area as a result of this and we feel that this constituted the full measure of Board responsibility. This opinion is based on the fact that this was not the first attack of such generalized back pain for which you have been treated and others have been non-compensable. It would appear that your complaints range from pain in the lower neck to pain as low in the sacroiliac area. We cannot attribute such generalized problem to the act of pushing against a load of veneer."

8. From a review of Mr. Forrest's claim file, it appears that most of the references to "generalized back pain" are from Mr. [C] the chiropractor who treated Mr. Forrest. Mr. Forrest maintains that after his work injury, he complained only of his low back.

My investigator contacted Mr. [C] to clarify the discrepancy between Mr. [C] 's reports that Mr. Forrest had "generalized back pain" and Mr. Forrest's statement that he only complained of low back pain. Mr. [C] explained that, from his viewpoint as a chiropractor, if Mr. Forrest complained of problems with his back, he also had problems in his neck. Therefore, according to Mr. [C] , although Mr. Forrest's basic complaint related to his low back, he had a problem with his neck whether he knew it or not. He stated that although it was the low back which disabled Mr. Forrest and which was the focus of his complaints, the basis for Mr. [C] reporting that he had generalized back problems was his knowledge that everyone with a low back problem theoretically has a neck problem.

9. The only other references, other than those of Mr. [C] , to generalized back pain were:

   a) Memo dated October 19, 1970 - Dr. [redacted] stated "he has also noted since the chiropractic treatments that he has some pain now between the scapulae and also in the cervical spine". (my emphasis)

   b) Report from Dr. [R] dated November 16, 1970 refers to pain between shoulder blades.

   c) Treatment Record at Board Rehabilitation Clinic - November 10, 1970: "He has tenderness between the scapulae medial to the left scapulae distal third."

10. There is no further reference to anything but Mr. Forrest's low back by both the Board and outside doctors until October 6, 1971, when Mr. [C] again reported "whole back and neck spasmed and sore, with impaired mobility of neck, lower back and legs". Mr. Forrest, in his extensive statement of November 5, 1971, only refers to low back, low hip and leg pain as his complaints.

11. Therefore, it would appear that the references to generalized back pain by Mr. [C] were made because of Mr. [C] 's chiropractic knowledge of the interconnection between the neck and the rest of the spine rather than because of any specific complaints on the part of Mr. Forrest concerning his neck. Further, it would appear that Mr. Forrest did not note any cervical or scapulae pain until he had had chiropractic treatment to this area, and that these symptoms did not manifest themselves at the time of the injury. Moreover, the symptoms ceased shortly after chiropractic treatments were discontinued as can be seen by the fact that there are no more references to

these areas after this time. As well, Dr. [B] informed my investigator that the shoulder blade problem which he reported on November 16, 1970 was not a significant factor in preventing Mr. Forrest from returning to work.

12. Dr. [B] also informed my investigator that he was not sure that Mr. Forrest ever recovered from his 1970 injury because he worked with great difficulty. He stated that, in his opinion, there was no reason to feel that the 1970 injury was not significant.

13. In a memo dated December 22, 1971 the boards of review stated that "the origin of Mr. Forrest's generalized back pain is anybody's guess, but quite possibly often are (sic) due to off-the-job activity. This was the case in January, 1970."

14. The boards of review were apparently referring to notations in the file that, prior to his work accident, Mr. Forrest had suffered a painful neck in January, 1970 when he stepped in a hole and fell flat. When the chiropractor initially reported to the Board regarding Mr. Forrest's August 17, 1970 accident, he stated that he had treated Mr. Forrest for a similar condition in January to March, 1970. Mr. [C] advised my investigator that although Mr. Forrest's neck would have been his main focus of attention, at that time, he would have checked his entire spine. As indicated earlier, Mr. [C] 's viewpoint of the close relationship between the neck and the whole spine would account for his seeing the problems of January, 1970 and of August, 1970 as related, even though Mr. Forrest complained of pain in the neck from the first injury and of pain in his low back from the second injury.

Therefore, there is no evidence to support the statement that Mr. Forrest's generalized back pain is possibly due to off-the-job activity. Firstly, Mr. Forrest did not complain of generalized back pain, except for a three week period after chiropractic treatments to his neck. Secondly, according to Dr. [A] 's letter of December 23, 1970, chiropractic treatment eased the pain at this time.

Based on the above, I may conclude that the Board's decision to refuse the re-opening of Mr. Forrest's claim in October, 1971 was unjust as it failed to consider relevant factors. These relevant factors include the facts that the Board doctor felt that Mr. Forrest's condition was becoming chronic upon his discharge from the Rehabilitation Clinic; that he returned to a job that necessitated walking eight miles a day, a movement which Dr. [A] noted aggravated Mr. Forrest's pain; that Mr. Forrest did not complain of generalized back pain except for a three week period; and that there is no evidence to suggest that his pain was due to off-the-job activity.

Possible Recommendation:

I have not yet reached a final conclusion on this complaint, and I would appreciate your comments on the grounds set out above. I am considering the following recommendation:

> That the Board re-open Mr. Forrest's 1970 claim effective October 1, 1971 and assess him for a disability award.

Karl A. Friedmann
Ombudsman
March 14, 1984

WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04 357722

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OFFICE OF THE COMMISSIONERS

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2 May 1984

Dr. Karl A. Friedmann
Ombudsman
Legislative Assembly of
British Columbia
#202 - 1275 West 6th Ave.
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

Re: Terrence FORREST
Claim No. C70058177

Your letter of March 14, 1984, has been considered by the Commissioners.

You are questioning the Board of Review's decision of December 22, 1971, not to re-open the claim for problems experienced in October, 1971. Mr. Forrest was paid wage loss from August 17, 1970, the date of his injury until February 28, 1971, when after a period of light work, he returned to normal employment until September 30, 1971. The Commissioners are unable to agree with your proposals that further benefits be paid.

In paragraphs 2 to 3 on pages 2 and 3 of your letter, you quote from three doctors' reports. You rely on these reports to contradict the Claims Adjudicator's decision that Mr. Forrest had recovered from his injury by March 1, 1971. It seems to the Commissioners that these quotations do not support your position since they were all made in 1970, more than 2 months prior to Mr. Forrest's return to work. Furthermore, in Dr. [A] 's report of December 23, 1970, the last of the reports quoted, it is, as you note, stated that Mr. Forrest would recover and return to his job.

.../2

You suggest in paragraphs 4 and 5 of your letter that the nature of Mr. Forrest's work in the period following March, 1971, would have aggravated his condition. However, it appears to the Commissioners that this is purely speculative. Mr. Forrest has, as far as they can see, never referred his later complaints to his work in this period. They refer you in particular to page 4 of the interview with him on November 5, 1971, where he states that there was no new incident or occurrence in this period. He was just doing his normal duties.

The Commissioners note your explanations in paragraph 6 of your letter regarding Mr. Forrest's failure to seek medical treatment in the period following March, 1971, but do not feel that this would justify any change in the board of review's decision. They would again draw your attention to the interview with Mr. Forrest in November, 1971, pages 1 to 2, where he states that prior to the end of August, 1971, he had only very occasional pain. It would seem more reasonable to conclude that he did not seek treatment because he experienced no real problems that would have required him to do so.

In paragraphs 7 to 11 of your letter, you deal with the Board of Review's conclusion that Mr. Forrest had generalized back problems, not restricted to the low back, which could not be the result of the August, 1970, low back injury. They note your explanation regarding Dr. [C] 's references to neck complaints. However, when they examine the specific words set out in Dr. [C] 's report, they find this explanation difficult to accept. He uses such terms as "general soreness throughout back", "general back and neck stiffness". These words are describing neck symptoms, not just an underlying neck condition. Furthermore, your explanation does not account for the references to the upper back by the Clinic Doctor, Dr. [B] and Dr. [redacted]. Dr. [redacted] 's report of July 3, 1974, is of significance in that it suggests that by that time at least the upper back complaints were a major factor. You suggest that the neck symptoms ceased shortly after the chiropractic treatment ceased, but this seems untrue having regard to Dr. [redacted] 's report.

Paragraph 14 of your letter deals with the non-work injury Mr. Forrest experienced in January, 1970. Again the Commissioners have difficulty with Dr. [C] 's recent comments cited by you having regard to the actual words of his August 21, 1970, report.

Re: Claim No. C70058177 2 May 1984

In conclusion, the Commissioners do not consider that you have presented a case for overturning the Board of Review's 1971 decision. They feel that the decision was a reasonable one for which there was supporting evidence.

Yours truly,

N.C. ATTEWELL
Secretary to the Board

NCA:hb

Legislative Assembly
Province of British Columbia

OMBUDSMAN

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000066

File: 83-50155

October 24, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Mr. Terrence Forrest, W.C.B. Claim No. C70058179

I have received Mr. Attewell's letter of May 2, 1984 concerning Mr. Forrest. I have considered the Commissioners' comments regarding my proposed recommendation that the Board re-open Mr. Forrest's 1970 claim effective October 1, 1971 and assess him for a disability award. I disagree with the Commissioners' comments for the following reasons:

1. The Commissioners stated that the three doctors' reports from which I quoted to contradict the claims adjudicator's decision that Mr. Forrest had recovered from his injury by March 1, 1971 do not support my position. They state this because the reports were all made in 1970, more than two months prior to Mr. Forrest's return to work, and because in the last of the reports quoted, that of Dr. [A] , it is stated that Mr. Forrest would recover and return to his job.

   Firstly, I do not agree that the fact that the first two reports were made more than two months prior to Mr. Forrest's return to work invalidates their content. Rather, these reports are important as they show that, over the course of Mr. Forrest's treatment prior to his return to work, the Board doctors did not expect him to recover completely from his injury. Although Dr. [A] stated in his December 23, 1970 report that he expected that Mr. Forrest would improve satisfactorily and that he would eventually return to his job without any surgical procedure being necessary, Dr. [A] altered his opinion in his subsequent report of January 18, 1971 in which Dr. [A] stated that Mr. Forrest had returned

to work for three days, and that his pain had returned and remained with him. As a result Dr. [A] recommended a period of partial compensation and stated that this could be arranged at his work. Dr. [A] has recently advised my investigator that at the time Mr. Forrest returned to work, it was Dr. [A]'s impression that he would be able to carry on. He further stated that when Mr. Forrest reported that he was getting worse, it appeared that it was possible to arrange light work for him. Dr. [A] expected that, by taking the light work and by using his back support which had been recently made for him, that Mr. Forrest would be able to carry on. Therefore, Dr. [A]'s last report is consistent with the earlier reports before Mr. Forrest attempted to return to work, i.e. that Mr. Forrest was left with a chronic backache, and that he was not capable of returning to his usual work, but that he should obtain a "suitable" or "light" job. It is also consistent with the employer's phone call, recorded in a memo dated February 18, 1971, two days after Mr. Forrest started on four hour shifts, that "it was agreed that this man was considered partial (sic) disabled and that a four hour day did appear reasonable."

Dr. [B] has also advised my investigator that he did not agree with Dr. [redacted] of the Board's Rehabilitation Clinic that Mr. Forrest was capable of returning to his work when she telephoned Dr. [P] on December 15, 1970.

Secondly, although in his last report of January 18, 1971, Dr. [A] gave the opinion that Mr. Forrest was not able to resume his usual work, and he recommended a period of partial compensation, Mr. Forrest only performed "light work" for the following two weeks. As I noted in my preliminary report, the reason that Mr. Forrest returned to an eight hour shift after doing "light work" for two weeks was not necessarily because he felt or was fully capable of performing this job, but because he states he was told by the employer's Personnel Manager that he either return to an eight hour shift or "return to compensation". This statement is supported by the fact that, two days after Mr. Forrest's commencement of his light work on a four hour shift, the employer indicated that a four hour day created many problems for the mill and that he "would work something out" with the claimant.

2. The Commissioners state that my suggestion that the nature of Mr. Forrest's work in the period following March, 1971 would have aggravated his condition is purely speculative. They further state that Mr. Forrest has never referred his later complaints to his work in this period, and refer me to Mr. Forrest's statement that there was no new incident or occurrence in this period, but rather he was just doing his normal duties.

When one considers the facts that Mr. Forrest had not fully recovered from his injuries when he returned to work; that two doctors recommended that he seek "suitable" or "light" work; that Mr. Forrest only performed light work for two weeks and then performed heavier work to convenience the employer; and that the work he performed consisted of eight miles of walking (running) per shift despite the fact that Dr. [A] had stated that his pain was aggravated by sitting and walking, it is reasonable to conclude, on a balance of probabilities, that Mr. Forrest's work after March, 1971 would have aggravated his condition.

Further, Dr. [A] has stated to my office that if Mr. Forrest's work aggravated his condition, his pain would be gradually worsening during the time he was performing his job. In his interview with the Board on November 5, 1971, Mr. Forrest described how he would suffer pain infrequently at first, but by the end of August, 1971 the pain was on a daily basis, worsening so that the pain became constant. This lends further support to the probability that Mr. Forrest's job aggravated his condition resulting from his work accident, which had not completely resolved itself when Mr. Forrest returned to his job in February, 1971.

The fact that he did not refer his later complaints to his work in this period is not surprising in view of the fact that Mr. Forrest was not asked what he referred his complaints to, and he did not comment on this issue one way or the other. However, it would seem that the fact that Mr. Forrest contacted the Board in September, 1971 because of his increasing pain at work and requested a re-opening of his claim would demonstrate his belief that his pain was related to either his work activity, his previous work accident, or a combination of the two. Further, Mr. Forrest stated to the Board that after his pain increased and he reported to the employer in the middle of September, he was taken off his job of turning sheets and given a job for one week which just involved standing and no physical action. He found that with this lighter work, his pain was not as bad at the end of the shift. After the one week of light work, he stated that he was told to return to his previous job of turning sheets, and at the end of the shift the pain "started to get pretty strong again" and worsened. The fact that there was no new incident after March, 1971 should not prohibit the Board from allowing a re-opening of Mr. Forrest's claim on the basis that his worsened condition after September, 1971 was a result of his previous work injury, from which he had not fully recovered, combined with a work activity which aggravated this unresolved condition.

3. The Commissioners find it difficult to accept my explanation regarding Dr. [C] 's references to Mr. Forrest's neck complaints. I had stated in my preliminary report that Mr. Forrest did not note any cervical or scapular pain until he had had chiropractic treatment to this area, and that these symptoms did not manifest themselves at the time of the injury. I also stated that there is no evidence to support the board of review's statement that Mr. Forrest's generalized back pain is possibly due to off-the-job activity.

I would point out that Mr. Forrest only referred to his low back, low hip and leg pain as his complaints related to his 1970 work accident. He never attributed his scapular and neck pain to his accident. Whether or not his scapular and neck pain is due to causes other than his work accident should not be of concern as it is only his low back, low hip and leg pain that Mr. Forrest relates to his work accident. The Commissioners have previously stated in other cases that the Board does not have to prove that a claimant's condition is due to some other cause in order to conclude that the condition is not related to a work injury. Conversely, the Board should not have to determine the cause of Mr. Forrest's scapular and neck condition or symptoms in order to conclude that his low back pain after March, 1971 is related to his accident. As I noted earlier, in his extensive statement of November 5, 1971, Mr. Forrest only refers to low back, low hip and leg pain as his complaints between March and September, 1971. These worsening pains were the basis of his request that the Board re-open his claim. The fact that he may have also had neck and scapular discomfort or that this may have been an underlying condition should not affect the Board's consideration of his request regarding his low back pain. In my opinion, the boards of review erred in considering that because Mr. Forrest had "generalized back pain", that none of his specific areas of pain could be related to his work accident. The Commissioners did not correct this error when they accepted the boards of review's recommendation.

I wish also to comment on the employer's letter of April 13, 1984, a copy of which has been forwarded to you. The employer states: "The evidence on file indicates that Mr. Forrest was involved in a rather insignificant incident at work on August 17, 1970 and the physical findings were minimal ... We feel it is unreasonable to assume that the complaints in the Fall of 1971 are related to the August 17, 1970 injury. In fact, the incident on August 17, 1970 was so minor in nature it was not reported to our First Aid Room until August 19, 1971." Firstly, Mr. Forrest's Application for Compensation indicates that he reported the accident to the foreman on August 18, 1970. As well, the Employer's Report as well as the First Aid

Report states that Mr. Forrest first reported his injury on August 19, 1970. Therefore, the delay of one year in reporting his injury as attributed to Mr. Forrest by the employer is erroneous. Secondly, I do not agree that Mr. Forrest's work accident was "rather insignificant" or "minor in nature" in view of the fact that the Board considered him totally disabled from this accident from August, 1970 to February, 1971, and when he had not recovered by November, 1970, admitted him to its Rehabilitation Clinic for therapy which continued for over a month.

The employer further states: "Further evidence on file indicates previous back problems relating to a fall in January of 1970 and medical findings indicating a pre-existing spondylolisthesis". I note that Mr. Forrest's "previous back problems" related to his cervical and scapular area, and not his low back area, which was the main focus of his complaints after his work injury. Further, the diagnosis of "pre-existing spondylolisthesis" given by Dr. [A] in his letter of December 23, 1970 is disputed by the x-ray report of November 10, 1970 in which the Board radiologist gives the opinion that "...I do not see any evidence of spondylolisthesis, although in the oblique views there is a suspicion of a defect in the pars interarticularis of L.5 on the left side." Even if there were a pre-existing spondylolisthesis, there is no evidence that this condition disabled Mr. Forrest prior to his work accident or that it was responsible for the recurrence of his pain in 1971.

Based on the above, I have concluded that the Board's decisions to refuse the re-opening of Mr. Forrest's claim in October, 1971 and to accept the boards of review recommendation were unjust as they failed to consider relevant factors. These relevant factors include the facts that Mr. Forrest's condition had not resolved when he returned to his work; that medical opinions prior to and after his return to work were to the effect that he should seek "suitable" or "light" work; that Mr. Forrest only performed light work for two weeks before being told by the employer to return to a heavier, eight hour shift; that this job necessitated walking eight miles a day, a movement which Dr. [A] noted aggravated Mr. Forrest's pain. Further, the possibility that Mr. Forrest may have had a neck and scapular condition or problem prior to and after his work accident should not be relevant in the Board's determining if his specific low back complaints, which have been consistent since his work accident and absent before his work accident, are related to his work injury.

Pursuant to Section 22 of the Ombudsman Act, I recommend that the Board re-open Mr. Forrest's 1970 claim effective October 1, 1971 and assess him for a disability award.

I look forward to your reply at your earliest convenience.

Yours sincerely,

Karl A. Friedmann
Ombudsman

WORKERS' COMPENSATION BOARD

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VANCOUVER

8 February 1985

Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
#202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: Terrence FORREST
Claim No. XC70058177

Your letter of October 24, 1984, has been considered by the Commissioners.

Enclosed is a copy of a letter dated November 16, 1984, received from Mr. Forrest's employer.

The Commissioners have concluded that you have no significant new information or argument that would justify their changing their decision. Their comments on the points you raise are set out below.

1. The fact that the Board doctor's comments regarding the long term nature of Mr. Forrest's problem were made in 1970 does not necessarily invalidate them as evidence in deciding whether he had recovered by March 1971. However, their significance does become questionable if, as occurred in this case, evidence is later received showing that there was, in fact, a recovery by that date.

Dr. [A] 's report of January 18, 1981, does not indicate to the Commissioners that he had altered his prior opinion that Mr. Forrest would eventually recover and return to his old job. The most reasonable interpretation of that report is that the doctor is simply recommending a procedure for attaining recovery. The Commissioners note the recent conversation which one of your investigators had with Dr. [A] , suggesting that he expected Mr. Forrest to return to light work. However, they can only point out that Mr. Forrest did return to his normal work and was able to do this work for the following six months.

continued...../2

RE: Terrence Forrest
Claim No. XC70058177

8 February 1985

2. While there may be various reasons for expecting that Mr. Forrest's normal work in the period following March 1981 might have aggravated his condition, there is evidence that it did not do so. In particular, the Commissioners would point to the lack of complaints by Mr. Forrest prior to the end of August 1971. The employer's letter of November 16, 1984, also suggests that the work Mr. Forrest was doing was not really that heavy. You refer to an incident in September 1971, when the pain was reduced while doing lighter work for a week and then increased when Mr. Forrest returned to heavier work. This does not seem to the Commissioners to be necessarily significant since prior to that time Mr. Forrest's back complaints had already again become significant. If someone already has serious back complaints, they will clearly fluctuate according to the type of work done, but that does not mean that the work caused those complaints.

3. It is true that, just because Mr. Forrest has non-compensable upper back complaints, does not necessarily mean that his lower back complaints are also non-compensable. If, however, he has upper back problems from natural causes, it does suggest that his lower back problems could be of the same general origin. The chiropractor clearly seems to regard the problems throughout his whole spine as basically the same and states that he treated Mr. Forrest for a similar problem prior to his injury. There is evidence of a pre-existing spondylolisthesis, even though this diagnosis may not be totally certain.

The Commissioners must conclude that, having regard to the previous problems Mr. Forrest had in his back and the evidence of a pre-existing condition, the relatively minor nature of the original incident, his return to his normal work for a period of six months before he had further problems, the Board's existing decision is a reasonable one. Though arguments to the contrary may be possible, the balance of the evidence indicates that the injury was a temporary aggravation of a pre-existing problem from which Mr. Forrest recovered. The Commissioners have decided to reject your recommendation.

continued...../2

RE: Terrence FORREST
Claim No. XC70058177 8 February 1985

Yours truly,

N. C. ATTEWELL
Secretary to the Board

NCA:md

Legislative Assembly
Province of British Columbia

Vancouver
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V6H 1A6
Telephone (604) 736 8721

000075

File: 83-30763

December 22, 1983

The Chairman,
Workers' Compensation Board,
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6

Dear Sir:

Re: Complaint of Mr. Wilhelmus Chatrer, W.C.B. Claim Nos. 62010991, 62036126, 63073077, 65022541, 66041784, 67009565, A73048561 and XB78075094

I am nearing completion of my investigation of this complaint. Pursuant to section 16 of the Ombudsman Act, I enclose my preliminary report which sets out the grounds upon which I may make a recommendation.

I would appreciate your comments.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Encl. (1)

Report of Investigation

Complainant: Mr. Wilhelmus J. Chatrer

Authority: Workers' Compensation Board

Background:

Mr. Chatrer has had eight compensable injuries involving his low back, all of which have been accepted by the Board. Mr. Chatrer first injured his low back in February 1962 when he was lifting a flywheel reported as weighing 75 to 80 pounds and felt "something snap in his back". An x-ray taken the day of the injury showed minimal degeneration, described by the Board Assistant Medical Director as "nothing very remarkable about this in a man 39 years of age". He had had no previous back problems or treatment. He received wage loss benefits for approximately three weeks. According to Dr. Hill's letter of September 13, 1966, Mr. Chatrer "returned to work in two to three weeks but since then his back has not felt right. He has continued to have recurring episodes of pain in the back in response to strain movements such as bending, lifting and so forth. He has had chiropractic adjustments from time to time which have temporarily relieved his symptoms but lately these also have been ineffectual". Mr. Chatrer injured his back again on July 3, 1962 when he slipped on cleaning solution.

In 1963 Mr. Chatrer injured his back at work again. The diagnosis was back strain with a possible disc lesion. He received wage loss for one week. In 1965 Mr. Chatrer again twisted his back at work. An x-ray taken shortly after this accident showed a definite reduction of the disc space between L5 and the sacrum approximately 50% of normal. The claim was accepted and Mr. Chatrer was paid wage loss for approximately three weeks.

In 1966 Mr. Chatrer suffered another back strain. The claim was accepted by the Board on a no-time-loss basis. Dr. Hill reported to the Board that Mr. Chatrer was having increased incapacity as a result of structural changes at the lumbosacral level which dated back to the 1962 injury, and that Mr. Chatrer would ultimately require the removal of the lumbosacral disc and a fusion.

In 1967 Mr. Chatrer again twisted his back at work. On April 19, 1967 the boards of review denied responsibility for the fusion on the basis that the disc degeneration was evident prior to the 1962 accident. On June 30, 1967 Mr. Chatrer underwent a fusion of L4-S1. On October 10, 1967 the Commissioners also refused responsibility for the fusion. In 1973 Mr. Chatrer slipped on grease, twisting his back and pelvis.

In 1978 Mr. Chatrer injured his low back when he slipped down a ladder. He received wage loss for approximately six weeks. In 1979 his attending physician reported that he had worsening back and knee pain. Mr. Chatrer was reassessed for pension purposes on May 23, 1980. This exam was primarily for the purpose of determining whether Mr. Chatrer's knee disability had worsened. On July 7, 1980 the Disability Awards Officer wrote to Mr. Chatrer that as his knee condition had deteriorated since last assessed, he would be entitled to an upward revision of his pension. The Disability Awards Officer also stated that as his low back impairment had returned to the state it was in following his non-compensable surgery, no award was indicated for this impairment.

Last Decision Level:

The last relevant decision was that of the Commissioners dated October 10, 1967 as noted above.

Issue:

Did the Commissioners err in refusing to accept responsibility for the fusion to Mr. Chatrer's low back, as communicated in their decision of October 10, 1967?

Employer Notification:

The employer has not been notified as he had not objected to this claim, and because if the Board accepts my recommendation, it will be the Disability Awards Officer who will decide on any pension to be awarded to Mr. Chatrer. This decision will be appealable by the employer if he objects to it.

Grounds for Adverse Findings:

In my opinion, this complaint may be substantiated on the following grounds:

1. The Commissioners, in deciding on October 10, 1967 to refuse responsibility for Mr. Chatrer's fusion, did not consider whether the 1962 and/or subsequent back injuries had permanently aggravated the condition of Mr. Chatrer's spine so that a fusion was required. Instead, both the boards of review and the Commissioners restricted their consideration of this issue to the fact that there was x-ray evidence of degenerative disc disease which preceded Mr. Chatrer's 1962 claim.

2. To demonstrate this deficiency in the decisions of the boards of review and the Commissioners to deny responsibility for Mr. Chatrer's fusion, the following is noted:

a) Memo #3 (1967 claim) to Unit Head and Board of Review:

> In regard to the back fusion, it is noted as far back as 1963, remarks were made of a two level fusion (Memo #5 on claim 63073077). On each succeeding back claim, remarks were made by the various doctors that a fusion would probably be necessary. In view of this, I do not feel that the operation now proposed should be a responsibility of this man's employer in 1967. In any event the proposed operation should be authorized by the board of review in view of the fact that P.E. has been applied on previous claims.

b) The notations on file regarding the boards of review's consideration of whether the Board was responsible for the fusion consisted of:

> He seems adept at reporting an accident but I fail to see how bumping his head on the frame would cause injury to low back and right knee. I would disallow the claim.
>
> I would allow knee (arthrotomy) but not the fusion.

The former statement does not adequately address the question of whether the need for a fusion is related to Mr. Chatrer's 1967 injury. Rather, it questions the validity of the entire claim, which had already been accepted by the Board.

c) In referring the claim to the Commissioners for their decision regarding the Board's responsibility for the fusion, the following is stated:

> Claimant is appealing the refusal to accept responsibility for the spine fusion. Responsibility was restricted on the x-ray evidence of degenerative disc disease which preceded his back claim. The boards of review would not change this limitation.

The Commissioners, in deciding to deny the appeal, noted only on the file that: "Board responsibility does not extend to fusion".

Therefore, it is clear that in denying responsibility for Mr. Chatrer's fusion, no consideration was given to whether the 1962 and/or subsequent accidents permanently aggravated his pre-existing disc degeneration.

3. Prior to 1968 the relevant provision of the Act was Section 7(5) which stated:

> Where the personal injury consists of injury or disease in part due to the employment and in part due to causes other than the employment or where the personal injury aggravates, accelerates or activates a disease or condition existing prior to the injury, compensation shall be allowed for such proportion of the disability as may reasonably be attributed to the personal injury sustained.

The relevant medical evidence on file consists of:

a) September 13, 1966: Dr. Hill: "This patient is having increasing incapacity as a result of structural change at the lumbosacral level which in my opinion dates back to the injury he sustained as described above. I believe that this patient will ultimately require removal of his lumbosacral disc and fusion of the lumbosacral intervertebral disc space in view of an increasing symptomatology which is resulting in incapacity and work impairment."

b) Memo #2 dated April 21, 1965 (1965 claim) by a Board doctor regarding the application of Section 7(5) of Act: "It is noted in the x-rays of February 26, 1962, that disc is narrowed at L4-L5 and only small bony spurs present. As the changes are mild, I would doubt if P.E. would be applicable from the U.M.O."

c) September 27, 1966: Dr. Hayes of the Board responded to the question of whether the Board had further responsibility regarding a fusion by stating:

> In 1962 this worker showed no evidence of disc extrusion and had degenerative changes at two levels. He now has sciatica and I would relate his problem to the 1966 strain rather than 1962 if claims consider the 1966 strain adequate.

The Board decided that the 1966 accident would not result in the problems reported by Dr. Hill.

d) It is not correct that there was no evidence of disc extrusion in 1962. The surgeon's first report dated March 3, 1962 give "herniated disc" as a diagnosis.

4. Therefore, of the medical evidence referred to above, only Dr. Hill addresses the question of the relationship of the 1962 accident to the x-ray changes at the lumbosacral level, and the necessity for a fusion. Dr. Hayes, in his opinion

that Mr. Chatrer's need for a fusion was not related to his 1962 accident, did not appear to consider the question of whether the 1962 accident had permanently aggravated or accelerated the pre-existing disc degeneration.

5. Mr. Chatrer has provided me with a report by Dr. Lai, his family physician. Dr. Lai's opinion is that Mr. Chatrer's back injuries could have had a cumulative effect resulting in advancement of his current degenerative disc disease. A copy of this report is enclosed.

6. Mr. Chatrer has informed my office that although the employer reported the weight of the flywheel in the 1962 accident as 75 pounds, and Mr. Chatrer himself reported the weight as 60 to 80 pounds, he has recently learned from the Parts Department of Cummins Diesel that such a flywheel would weigh 150 pounds. He states that he originally reported it as 60 to 80 pounds as that is what he was told it weighed by his employer. My investigator contacted Cummins Diesel who informed her that the flywheel for an NH220 engine would weigh 100 to 180 pounds, depending on the type of clutch that was used. The fact that the flywheel probably weighed more than first reported to the Board may be significant when considering the severity of Mr. Chatrer's 1962 accident and its relation to the progression of his subsequent disability.

7. My investigator stated in her letter of November 9, 1983 to the Disability Awards Manager that despite the fact that the Board applied "Proportionate Entitlement" to Mr. Chatrer's claims, Mr. Chatrer was never assessed for a pension to which "Proportionate Entitlement" could be applied. The Disability Awards Manager replied on November 17, 1983 that: "The Disability Awards Officer's decision letter dated July 7, 1980 specifically denied a permanent partial disability award for Mr. Chatrer's spine. It was determined that he had returned to his pre-1967 injury state as the medical examination for a permanent partial disability indicated the findings with respect to the back were consistent with a person having a two level fusion. In other words it was determined that Mr. Chatrer suffered a temporary aggravation only and this decision was consistent with No. 31.30 of the Claims Adjudication Manual and Decision #270 of the Workers' Compensation Reporter".

8. Although the Board determined on July 7, 1980 that Mr. Chatrer suffered a temporary aggravation, this was only in respect to the 1978 work injury, and not the injuries earlier than 1978. In fact, the Disability Awards Officer stated in her letter of July 7, 1980: "It is noted that your low back impairment has returned to the state it was in following your non-compensable

surgery, therefore, no award is indicated for this impairment". Therefore, although the decision of July 7, 1980 may have been consistent with 31.30 of the Claims Adjudication Manual and Decision #270 of the Workers' Compensation Reporter, the decision is limited to the 1978 injury and does not apply to previous compensable injuries.

9. In order to consider whether proportionate entitlement would apply to any pension awarded to Mr. Chatrer on the basis that his injuries permanently aggravated his pre-existing condition, Reporter Decision #270 is relevant. Paragraph (b) of this Decision states:

> In cases where the precipitating event or activity, and its immediate consequences, were of a moderate or minor significance, and where there is only x-ray evidence and nothing else showing a moderate or advanced pre-existing condition or disease, Proportionate Entitlement should not be applied.

10. Decision #270 also states:

> Finally, this directive will apply to all Permanent-Partial Disability Awards assessed on or after March 15, 1978.

In his letter of November 17, 1983, the Disability Awards Manager stated that since the decision by the Commissioners in October, 1967 not to accept the spinal fusion was made prior to the writing of Workers' Compensation Reporter Decision #270, the Board's present method of determining proportionate entitlement would not have applied.

However, as noted in Point 6 above, Mr. Chatrer has never been assessed for a disability award on the basis of the spinal fusion and its consequences. Therefore, if he were to be assessed for a pension on this basis, it should be according to the principles of Decision #270.

Based on the above findings I may conclude that the Board's decision to refuse responsibility for Mr. Chatrer's fusion was unjust as it failed to consider a relevant factor. The evidence relied on by the Board to conclude that Mr. Chatrer's fusion was not related to his work injuries was that the 1962 x-ray showed pre-existing disc degeneration. The Commissioners did not consider whether the 1962 and/or subsequent accidents had permanently aggravated Mr. Chatrer's condition.

Possible Recommendations:

I have not yet reached a final conclusion on this complaint, and I would appreciate your comments on the grounds set out above. In order to assist you in focusing your response I am considering the following recommendation:

> That the Board consider whether Mr. Chatrer's 1962 and/or subsequent injuries permanently aggravated his pre-existing condition and so contributed to his requiring a spinal fusion in 1967, and if so, to assess Mr. Chatrer for a disability award.

Karl A. Friedmann
Ombudsman
December 22, 1983

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
6951 Westminster Highway,
Richmond, B.C.
V7C 1C6
Telephone 273-2266
Telex 04-357722

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OFFICE OF THE COMMISSIONERS

11 April 1984

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Dr. Karl A. Friedmann
Ombudsman
Legislative Assembly
#202 - 1275 West 6th Ave.
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

Re: Wilhelmus CHATRER
Claim No. XC67009565

Your letter dated December 22, 1983, has been considered by the Commissioners.

The Commissioners have had Mr. Chatrer's file reviewed by the Board's Orthopaedic Consultant. At the meeting they had with Mr. Bucher on March 29, 1984, members of your staff were provided with a copy of the Consultant's report of March 8, 1984.

In light of this report, the Commissioners have concluded that there are insufficient grounds for their reconsidering the previous Board decisions that the spinal fusion carried out in 1967 was not the result of the 1962 or subsequent injuries.

Yours truly,

N.C. ATTEWELL
Secretary to the Board

NCA:hb

MEMO TO: Dr. A.D. McDougall
Executive Director
Medical Services

8 March 1984

Re: Wilhelmus CHATRER
Cl.# XC67009565

I have gone over this man's voluminous file in considerable detail and I think probably the easiest way to give some meaningful comment would be to go over the letter written by Sonja Hadley, File 83-50763, item by item.

Mr. Chatrer hurt his low back in 1962, lifting a flywheel. The weight was said to be between 75 and 80 pounds but apparently the man has subsequently come up with information that it would weigh actually about twice this amount. This point, which might have some influence on lay persons, is of course of no significance. The question is, did he do anything in the way of damage to his low back at that time. He lost three weeks of work and an x-ray taken at this time showed some changes which were reported as follows: "degenerative change in the disc at the L.4-5 level is noted and possibly lesser degree of degeneration of the disc at L.5-S.1." It is therefore quite clear that these degenerative changes precede his episode of February 26, 1962. This is certainly not unusual in a man of 39 years. The chances of finding degenerative changes in the spine statistically are at least 20% in this age group. Between the ages of 40 and 60 the chances of finding degenerate changes in control series of asymptomatic persons goes up to 60%.

Dr. Hill states that this man's back was never right after his initial injury of 1962 and that he was having to get chiropractic manipulations from time to time because of chronic back discomfort. There is no question that chronic ligamentous stress can result from heavy occupations and I don't think there is any a priori reason to attribute this man's intermittent back pain to his injury of 1962. Dr. Hill further stated that, "structural change had been caused by this injury in 1962." This is not borne out by the information at the time of this man's spinal fusion when asymmetry of the lumbosacral facets was noted. This is a well known congenital anomaly or atopy which itself predisposes very definitely to degenerative changes with or without injury. There is very scant information throughout this man's file that there was ever any neurological deficit. Only on one annotation I noted that slight diminution of the left ankle jerk had been noted.

The next episode concerns November 25, 1963, when Mr. Chatrer was pushing a steam cleaner and twisted his low back. This was diagnosed as a back strain and a possible disc lesion but there was no evidence produced to indicate that this was a disc lesion and the man returned to work on December 3rd. I would say without hesitation that this man could not have ruptured a disc with nerve root compression if he had been able to return to work in this brief period of time.

His symptoms did continue, however, in the early part of 1964 and he saw Dr. John Watt, but Dr. Watt describes no leg pain and a negative neurological examination, so the presence of any nerve root compression

MEMO TO: Dr. A.D. McDougall
Executive Director
Medical Services

8 March 1984

Re: Wilhelmus CHATRER
Cl.# XC67009565

Cont'd. . .

there is any substance in permanent aggravation in any pathology of the discs, which I recognize. In short, I don't think that this man's 1962 or other injuries have had any real connection with the necessity for his spinal fusion.

J.G. Noble, M.D., B.S., F.R.C.S.(C)
Orthopedic Consultant
JGN:ss

Legislative Assembly
Province of British Columbia

OMBUDSMAN

202, 1275 West Sixth Avenue
Vancouver
British Columbia
V6H 1A6
Telephone: (604) 736 8721

000086

File: 83-50763

July 17, 1984

Mr. W. Flesher
Chairman
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C.
V7C 1C6

Dear Mr. Flesher:

Re: Mr. Wilhelmus Chatrer, Claim #XC67009565

I have received Mr. Attewell's letter of April 11, 1984 as well as a copy of Dr. Noble's report of March 8, 1984. As a result of Dr. Noble's report, the Commissioners have concluded that there are insufficient grounds for their reconsidering the previous Board decisions that the spinal fusion carried out in 1967 was not the result of the 1962 or subsequent injuries.

I have forwarded a copy of Dr. Noble's report to both Dr. Hill and Dr. Watt, as Dr. Noble stated that Dr. Hill's opinion was not borne out by the information at the time of the fusion and because the findings at the time of the fusion performed by Dr. Watt were a definite consideration in Dr. Noble's conclusion. I have now received replies from both Dr. Hill and Dr. Watt and am writing this letter pursuant to Section 22 of the Ombudsman Act.

I do not agree with the Commissioners that there are insufficient grounds for their reconsidering the previous Board decisions that the spinal fusion carried out in 1967 was not the result of the 1962 or subsequent injuries. The basis for my disagreement is as follows:

1. On page 1 of his opinion, Dr. Noble stated that "Dr. Hill further stated that 'structural change had been caused by this injury in 1962'. This is not borne out by the information at the time of this man's spinal fusion when asymmetry of the lumbosacral facets was noted. This is a well known congenital anomoly or atopy which itself predisposes very definitely to degenerative changes with or without injury." My

investigator asked Dr. Watt his opinion of the significance of the asymmetry of the lumbosacral facets found at surgery as it pertains to the issue of whether Mr. Chatrer's 1962 and or subsequent accidents permanently aggravated or accelerated his pre-existing disc degeneration. Dr. Watt replied, "I feel this man had asymmetrical facet joints at his lumbosacral level and this would pre-dispose to early degenerative changes in these joints. The actual abnormality is a congenital one, or a developmental one but the degeneration can be aggravated by injuries such as this man had on multiple occasions. I think degeneration in the facet joints is an accompaniment of disc degeneration. The disc is interior and the facet joints are posterior to the sac containing the nerves".

2. Dr. Noble stated on page 2 of his memo that "I think we may safely assume that this man's fusion was done on the basis of spinal instability." My investigator asked Dr. Watt whether he agreed with this statement. Dr. Watt replied, "This man's fusion was done to relieve his low back pain, which I felt was due to the degenerative disease in his back. I feel that the degeneration was aggravated by his work accidents". (my emphasis)

3. On page 2 of his memo Dr. Noble stated, "I believe that the only significant injury which a disc can sustain which leads to permanent aggravation of a situation, is a distinct disc rupture which, to be diagnosable, would really mean the presence of nerve root irritation or compression and a true sciatica with proper neurological signs and the appropriate symptoms. Mr. Chatrer has never had any of these such attacks and the fact that he did not have a nerve root exploration at the time of his surgery indicates that the surgeon at any rate, felt perfectly happy that there was no such nerve root compromise". My investigator asked Dr. Watt if he agreed with these statements and if not, what his opinion was. Dr. Watt replied, "I do not agree with Dr. Noble's statement i.e. I feel that a disc can degenerate and lose its supportive ability, without actually protruding and irritating the nerve, i.e., I think that disc degeneration can cause low back pain, without causing any leg pain or sciatica". A copy of Dr. Watt's report is attached for your information.

4. Since Dr. Noble stated that Dr. Hill's opinion that structural change had been caused by Mr. Chatrer's injury in 1962 was not borne out by the information at the time of Mr. Chatrer's spinal fustion when asymmetry of the lumbosacral facets was noted, my investigator contacted Dr. Hill to ascertain whether the findings of the operation had altered the opinion he had held in 1962, or whether his opinion remained the same. A copy of Dr. Hill's reply is attached. Dr. Hill concludes,

"I also firmly believe that Mr. Chatrer's occupation was part and parcel of the aggravation with change of the disc substance over the years and secondary to micro traumata as well as more florid trauma to the disc which was evidenced by the several claims which he had in the several intervening years. Therefore, in closing there is no alteration in my opinion as I feel that Mr. Chatrer should be seriously considered for a compensation coverage of his back disability and the formal treatment that it ultimately necessitated".

5. There is also the opinion of Dr. Lai which I provided with my letter of December 22, 1983. Dr. Lai's opinion is that Mr. Chatrer's back injuries could have had a cumulative effect resulting in advancement of his current degenerative disc disease.

6. I note that Dr. Watt, Dr. Hill and Dr. Lai had all examined Mr. Chatrer before reaching their opinions, whereas Dr. Noble's opinion was based on a review of the file material.

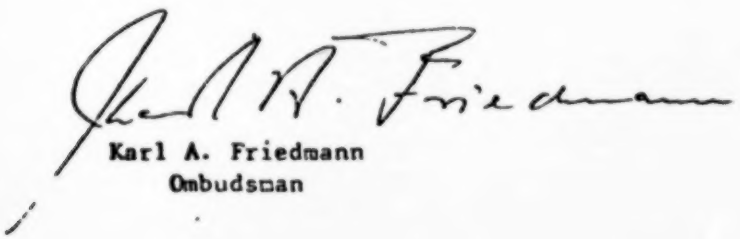
Therefore, in view of all the medical opinions, I have concluded that the preponderance of the medical evidence supports the conclusion that Mr. Chatrer's fusion was aggravated by his work accidents. Pursuant to Section 22 of the Ombudsman Act I recommend that the Board:

(1) assess Mr. Chatrer for a disability award to compensate him for any disability as a result of the spinal fusion in 1967,

(2) reimburse Mr. Chatrer for his medical expenses associated with his spinal fusion, and pay any wage loss benefits due him as a result of the fusion.

I look forward to your reply at your earliest convenience.

Yours sincerely,



Karl A. Friedmann
Ombudsman

Encls.(2)

JOHN G. WATT, M.D.

ROBERT N. MEEK, M.D. MARC R. BOYLE, M.D.

ORTHOPAEDIC SURGEONS

3195 GRANVILLE STREET VANCOUVER, B.C. V6H 3P2

PHONE 731-4611

000089

June 5th, 1984.

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VANCOUVER

Ms. Sonja Hadley,
Assistant to Ombudsman,
202 - 1275 West 6th Avenue,
Vancouver, B. C.
V6H 1A6.

Dear Ms. Hadley:-

RE: Mr. Wilhelmus Chatrer.
Your file No. 83-50763.

In answer to your questions posed in your letter of the 18th of April, 1984, I have the following to say:-

(1) I feel this man had asymmetrical facet joints at his lumbosacral level and this would pre-dispose to early degenerative changes in these joints. The actual abnormality is a congenital one, or a developmental one but the degeneration can be aggravated by injuries such as this man had on multiple occasions. I think degeneration in the facet joints is an accompaniment of disc degeneration. The disc is anterior and the facet joints are posterior to the sac containing the nerves.

(2) This man's fusion was done to relieve his low back pain, which I felt was due to the degenerative disease in his back. I feel that the degeneration was aggravated by his work accidents.

(3) I don't agree with Dr. Noble's statement i.e., I feel that a disc can degenerate and lose its supportive ability, without actually protruding and irritating the nerve, i.e., I think that disc degeneration can cause low back pain, without causing any leg pain or sciatica.

Yours sincerely,

JOHN G. WATT, M.D., F.R.C.S.)(C)

JGW/ht.

000090

KENNETH C HILL, M.D. - ROSS E CURRIE, M.D. F.R.C.S.(C)
Orthopaedic Surgeons
SUITE 314 - 4900 KINGSWAY
BURNABY, B.C. V5H 2E3
TELEPHONE 435-7822

APR 30 1984

The Office of the Ombudsman,
202-1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

April 25th, 1984.

Attn: Sonja Hadley

Dear Madam,

Re: Wilhelmus Chatrer. File No. 83-50763

This acknowedges receipt of your communication and documents of April 18th, 1984.

I find it strange that I have been asked to comment on this man in as much as I was not the attending orthopaedic surgeon but merely peripheral in terms of an opinion and I would suggest that Dr. John Watt be the Surgeon who provides a lot of this information that you have asked of me.

My contact with Mr. Chatrer has been singularly on examination dated September 12th, 1966 and dealing with the issue which you have raised.

It was my opinion gathering from this letter at that time that I felt that Mr. Chartrer's injury of 1962 was relative to his disability and therefore should be compensable in as much as the injury of 1962 and in fact the several injuries which followd this were compensation related. I find it rather strange that the Workers Compensation Board covered him for all these injuries and then in the final analysis rejected his claim for the final fusion which he underwent.

Dr. Noble states "that there is ~~any priority~~ A PRIORI reason to attribute this man's intermittent back pain to his injury of 1962" historically dis-associates the man's complaints following this specific injury and which continued on until he ultimately underwent a spinal fusion some years later, therefore I think this comment is incorrect. From the documents contained therein, the structural changes which were apparently present in the x-rays of 1962 were marginal but in 1966 my notes indicate that the structural changes were obviously quite prominent on x-ray. Therefore I do not understand Dr. Noble's statement, the only structural change evident was an asymmetry of the lumbo sacral facets when in fact there was a definite change in the structural anatomy of the intervertebral discs between the L4/5 and L5/S1 levels; so much so that Dr. Watt felt a fusion should be undertaken. I agree with Dr. Noble that I do not think that the facet joint change was of any significance. I also firmly believe that Mr. Chatrer's occupation was part and parcel of the aggravation with change of the disc substance over the years and secondary to micro traumata as well as more florid trauma to the disc which was evidenced by the several claims that he had in the intervening years. Therefore, in closing there is no alteration in my opinion as I feel that Mr. Chartrer should be seriously considered for a compensation coverage of his back disability and the formal treatment that it ultimately necessitated.

Yours truly,

K.C. Hill, M.D.

WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA

14 February 1985

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Dr. Karl A. Friedmann,
Ombudsman,
Legislative Assembly of British Columbia,
202 - 1275 West Sixth Avenue,
Vancouver, B.C.
V6H 1A6

Dear Dr. Friedmann:

RE: Wilhelmus CHATRER
Claim No. XC67009565

Your letter dated July 17, 1984, has been considered by the Commissioners.

In your letter of December 22, 1983, you proposed that the Board consider whether Mr. Chatrer's 1962 or subsequent injuries permanently aggravated his pre-existing degenerative condition and so contributed to the performance of the spinal fusion. The Commissioners agreed to do this and had Dr. Noble review the file. However, on the basis of his report dated March 8, 1984, the Commissioners decided to reaffirm the Board's previous decision. You were advised of this in my letter of April 11, 1984.

The Commissioners have concluded that by obtaining Dr. Noble's report and considering the question raised in your letter of December 27, 1983, the Commissioners have rectified any fault that may have existed in the prior Board decision. They note the further comments you have obtained from Dr. Watt and Dr. Hill and their disagreement with Dr. Noble, but can see no grounds for departing from their previous decision. They feel that Dr. Noble's opinion is a reasonable one which is supported by the available evidence. While he may not have personally examined Mr. Chatrer, this is not so material when the issue is causation. He had an advantage over Drs. Watt and Hill in having full access to the Board's files.

In the result, the Commissioners have decided to reject your recommendation; Mr. Chatrer's claim will not be re-opened.

Yours truly,

N. C. ATTEWELL
Secretary to the Board